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No. _____

In The

Supreme Court of the United States

TIMOTHY HELSETH,

Petitioner,

vs.

JOHN BURCH,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether innocent bystanders have a constitutional remedy for injuries caused by intentional police misconduct during a high-speed chase.

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PETITION FOR CERTIORARI

Petitioner Timothy Helseth respectfully petitions for a writ of certiorari to review the *en banc* judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The *en banc* opinion of the Eighth Circuit is reported at 258 F.3d 867 and is reproduced in Appendix A at 1a. The district court opinion is reported at 109 F.Supp.2d 1066 and is reproduced in Appendix B at 27a.

JURISDICTION

The *en banc* judgment of the Eighth Circuit reversing the denial of summary judgment to defendant Burch was entered July 31, 2001. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to

any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In August 1995, rogue Blaine police officer John Burch conducted a lengthy and intentionally dangerous high-speed chase of a car full of teenagers wanted only for a speeding violation. Burch's chase caused the death of one individual and the quadriplegia of petitioner, both of whom were not participants in the chase, and serious injury to four occupants of the chased vehicle, three of whom were juvenile passengers who had committed no crime. Burch's chase conduct was emblematic of his habitual, but perverse, view of acceptable police activity in such circumstances and wholly violative of constitutional and state statutory restrictions on the use of deadly force and departmental rules and policies regarding participation in a high-speed chase.

In a split decision, the *en banc* Eighth Circuit held that petitioner's constitutional rights were not violated. Relying on *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), the lower court held that bystanders injured during a high-speed police chase have no constitutional remedy, even when the defendant officer intends to cause harm and where, as here, the officer had time to deliberate before and during the chase and the victim is not the object of the pursuit. As shown below, this Court should grant review because the Eighth Circuit's decision represents an unwarranted extension of this Court's ruling in *Lewis* and exemplifies lower court confusion over *Lewis'* meaning.

Part A below sets forth the underlying facts. Because of the centrality of *County of Sacramento v. Lewis* to the question presented, Part B describes that decision in detail. Finally, Part C sets forth the procedural background and the Eighth Circuit's ruling below.

A. Statement of Facts

Just after midnight on August 22, 1995, Blaine, Minnesota police officer William Bott observed a car driven by 19-year old Everett Contois speeding on a straight desolate road used by teenagers for such purposes. (A297).[1] Traveling with Contois were three juvenile passengers. Bott gave chase and called out the location and activity of the vehicles on his radio. (A345). As was his habit, Blaine police officer John Burch used the radio transmissions to position his squad car in the chase path and assume the primary role in the chase at about the four-mile point. Burch's involvement in this high-speed chase was deliberate, not instantaneous or instinctive. (A345, 349).

After Burch became the primary chase squad, the chase passed through residential Blaine, coming to a natural stop at the end of a cul-de-sac ringed with houses and trees. Contois became frightened and drove his vehicle through a stand of trees and over a retaining wall in an effort to escape. (A395). At this point, Bott gave up the

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[1] All cites listed as A___ are to the Joint Appendix filed in the Eighth Circuit.

chase. Burch, however, did not.[2] Following Contois, Burch drove his car through a stand of trees, over a retaining wall, and into the back yard of the neighboring residences, nearly striking one of them. (A463-68).

After returning to the roadway, Burch decided to ram Contois' vehicle. In fact, Burch made at least four separate decisions about when, where and how to ram Contois' vehicle. The ramming caused significant damage to Contois' vehicle: deforming and removing metal; popping the trunk; releasing the convertible hood; destroying the rear lights; and mechanically injuring the vehicle. (A469-70). The driver's side window was broken by contact with the driver's head during one of Burch's rams, and Contois was convinced that Burch intended to kill him. (A272-76).

Contois fled with his frightened juvenile passengers in a "wobbling", "fishtailing" vehicle into the neighboring suburb of Spring Lake Park, closely pursued by Burch and fearing for his life. (A446-47). The chase continued through the residential area of that suburb, toward the major intersection of 81st Street and University Avenue, a commercial area with multiple traffic and turn lanes. Burch knew that, even near midnight, "there would be traffic." (A439).

Both Contois and Burch entered the busy intersection against a red light at 80-100 mph. (A348-49). At this point, Contois collided with petitioner Helseth's pickup, and

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[2] Burch has never voluntarily terminated his participation in a high-speed chase because he felt the pursuit activity was too dangerous. (A417).

Jeremy Carrigan and petitioner were both ejected from the vehicle. (A348-49). Petitioner suffered severe and permanent injuries to his spinal cord, rendering him a quadriplegic. Carrigan died. Burch was so close behind Contois that he had to brake his squad car to miss another vehicle northbound on University as he went through the intersection. (A517-18, 391 95). All three juvenile passengers in Contois' vehicle were seriously injured and hospitalized. (A348-50).

Burch admits he did not at any point in the chase have authority to use deadly force on Contois. (A49, 452). Burch likewise had no authority to use deadly force on any of the three juvenile passengers in the Contois vehicle, who had committed no crime.

The Blaine Police Department Manual defines "intentional ramming" as an "intentional, officer-initiated contact between the officer's vehicle and the target vehicle." (A330). The policy specifically recognizes:

> A rammed vehicle will, in all probability, experience a loss of control and a change of direction. Further, intentional ramming causes a high probability of serious injury or death. . . . This practice is discouraged except in those cases carrying a *most extreme* need to stop a vehicle and apprehend the occupant. . . . *Laws governing application of deadly force must be obeyed.*"

(Emphasis added.) (A330).

Burch admits he had the opportunity at various points in the Contois chase to make judgments about whether or not the chase should be continued. (A477). Burch admits considering a number of factors including:

roadway configuration; traffic levels; traffic on intersecting roadways; turn lanes and access points; roads known to have heavy traffic; differing traffic levels; use of cross streets in the chase path by the driving public; and mechanical damage done to Contois' vehicle.

(A456-59, 439, 475, 478, 479, 481-482).[3]

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[3] In the court below, Judge Bye observed that Burch admitted he had the opportunity to deliberate during the pursuit:

Q: But the policy and your training and your experience teach you to think about what you are doing in a high-speed pursuit and whether the risk of the pursuit is worth the apprehension, correct.

A: Sure.

Q: And that is not just supposed to be a reflex, that is supposed to be a thought process, correct.

A: Sure.

Q: And you had time to make decisions about what tactics to use in the chase, correct?

A: Sure.

Q: You had time to consider whether you would try one type or another or ramming maneuvers, correct?

A: Sure.

. . .

Q: You had time to consider the mechanical damage that you had done to the vehicle.

A: That is correct.

. . .

Q: You had time to consider whether to continue the chase into another police jurisdiction.

A. That is correct.

18-19a. (quoting Burch deposition)

Burch admits he was obligated to evaluate the risk to himself and the driving public against the need to apprehend someone for a gross misdemeanor. (A479-80). Burch's training and experience taught him to constantly evaluate the risk to the driving public. Burch admits he "had time to make decisions about what tactics to use in the chase" and "had time to consider whether you would try one type or another of ramming maneuvers." (A480). Burch admits that he was concerned with cross-street traffic that would not have much warning of the chase. (A487-88).

Burch is no stranger to controversy arising from the misuse of his squad. Burch was involved in twelve police vehicle collisions from September 13, 1978, until June 22, 1989, four involving high-speed pursuit situations and three involving emergency response driving. (A527). In addition, Burch caused seven other officer-initiated intentional vehicle collisions during high-speed pursuit situations. In 1989, the Blaine Police Chief met with Burch to discuss his driving. During the meeting, Burch complained, *"[I]f I have to answer a call and concern myself with car safety, then people are going to die."* (A529-30)[4]

The Chief's admonitions apparently fell on deaf ears. In an arbitration proceeding regarding an incident involving Burch in 1994, the arbitrator noted a number of

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[4] Judge Bye observed that:

> Officer Burch's conduct would shock the conscience even if we knew nothing about him. But we do. Helseth contends that Burch is that rare "rogue cop" who enjoys nothing more than the thrill of the chase. Burch's pre- and post-incident record strongly suggests that to be true. 22a.

serious allegations and disciplinary decisions. (A533-44). The arbitrator concluded Burch's "past disciplinary record and problem record reveal a pattern of someone who has difficulty performing his job within the parameter of department policies and regulations." He commented, "[t]he City suggests it has repeatedly attempted to reconcile [Burch's] maverick behavior through a variety of disciplinary actions, but he fails to admit fault or demonstrate remorse." (A538).

Even after the crash in this case, Burch continued to use his squad car as a weapon. In May of 1998, Blaine Police Chief David Johnson suspended Burch from duty without pay because Burch again improperly used his squad car as an instrument of deadly force in a high-speed pursuit in violation of both Blaine Police policy and state law and the Fourth Amendment to the United States Constitution. (A562-64).

B. This Court's Decision in *Sacramento v. Lewis*.

Four months after petitioner filed suit, this Court decided *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). *Lewis* addressed a substantive due process claim in a high-speed pursuit context.

In *Lewis*, two sheriff's deputies observed a motorcycle approaching at high speed. The motorcycle was operated by an eighteen-year old and carried a sixteen-year old passenger. The officers ordered the boys to stop, to no avail. The boys fled at high-speed and one of the officers pursued, in apparent conscious disregard of the department's policy against such police chases. Less than two minutes later, the speeding motorcycle tipped over as the

driver attempted a sharp left turn. The older boy was thrown clear, but the younger was killed when the patrol car skidded into him. The entire chase lasted a total of 1.2 miles.

The deceased boy's parents brought an action under 42 U.S.C. § 1983 against the county, the sheriff's department and the pursuing officer. They alleged the officer's conduct deprived the boy of life without due process. The Ninth Circuit held "the appropriate degree of fault to be applied to high-speed police pursuits is deliberate indifference to, or reckless disregard for, a person's right to life and personal security." *Lewis v. Sacramento County*, 98 F.3d 434, 441 (9th Cir. 1996).

On review, this Court framed the issue as "whether a police officer violates the Fourteenth Amendment's guarantee of substantive due process by causing death through deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender." *Lewis*, at 836. Justice Souter, writing for a unanimous court, answered "no" and announced the new standard: "[I]n such circumstances only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation." *Id.*

Lewis left open the viability of a cause of action under the Fourteenth Amendment where there is evidence of an intent to harm the suspects physically or worsen their legal plight. *Id.* at 854. In support of this position, the Court cited *Checki v. Webb*, 785 F.2d 534, 530 (5th Cir. 1986), in which the Fifth Circuit held a § 1983 claim may

be stated "when a citizen suffers or is seriously threatened with physical injury due to a police officer's *intentional misuse* of his vehicle." (italics in original). *Checki* involved a 31-mile chase conducted by two men in cowboy hats, who were later determined to be state troopers driving an unmarked police vehicle. *Id.* at 535. A woman passenger rode in the backseat of the unmarked vehicle. *Id.* The chase was conducted at speeds which at times exceeded 100 mph. *Id.* Because *Checki's* facts were so bizarre, this Court's citation to it has, in practice, provided little guidance to courts presented with claims involving chases with intentionally terrorizing conduct, which nonetheless fall short of the untoward and unexplainable conduct in *Checki*.

C. Procedural Background and Decision of the *En Banc* Eighth Circuit.

Petitioner commenced this action in the United States District Court for the District of Minnesota on January 20, 1998. Federal jurisdiction was based on 28 U.S.C. § 1343. The Complaint alleged, *inter alia*, that Burch violated petitioner's rights under the Fourteenth Amendment to the United States Constitution by depriving him of his liberty when Contois' fleeing vehicle collided with his vehicle at a high rate of speed. Petitioner alleged Burch's actions violated his rights under either of the then-prevailing standards, "deliberate indifference" or "shocks the conscience."

After discovery, Burch moved for summary judgment on the substantive due process claim, relying principally on *Lewis*. The district court denied the motion. Although the court applied the "deliberate indifference" standard

in analyzing Helseth's substantive due process claim, the court also found:

> . . . even if the Court were to assume that *Lewis's* "intent to harm" standard applied broadly to all high-speed chases, the evidence supports a reasonable conclusion that Burch possessed the requisite level of culpability. Burch was keenly aware, as a result of his training and experience, that using a PIT[5] maneuver against a car moving at high speeds causes a high probability of serious injury or even death. Yet, he used the maneuver on Contois' vehicle at least four times while it was moving at high speeds, under conditions that plainly did not justify the use of deadly force. Moreover, he continued to use the procedure even after it became evident that the vehicle was badly damaged and that if left alone the driver would likely stop due to the associated mechanical difficulties. A reasonable jury could infer from these facts that Burch intended to harm Contois and the three juvenile passengers in his car. Under either the "deliberate indifference" standard or the "intent to harm" standard, a genuine fact issue exists as to whether Burch's behavior was truly shocking to the conscience. For these reasons, plaintiff has met his burden of establishing that a constitutional violation occurred.

47-48a.

The Eighth Circuit, hearing the case initially *en banc*, overruled the panel opinion in *Feist v. Simonson*, 222 F.3d

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[5] PIT, an acronym for Pursuit Intervention Tactics, refers to officer-initiated contact with a vehicle in a chase.

455 (8th Cir. 2000), reversed the district court, and dismissed Helseth's substantive due process claim.

The Eighth Circuit below initially found that, "*Lewis* plainly stated that the intent-to-harm standard, rather than the deliberate indifference standard, applies to *all* high-speed police pursuits aimed at apprehending suspected offenders." 7a. (emphasis in original). The Court then held that the "deliberate ramming" of a fleeing suspect's car does not permit an inference of intent to harm under *Lewis*. 9a. The Court found that the only harm intended by Burch's ramming of Contois' fleeing vehicle was "incidental to Burch's legitimate objective of arresting Contois." 10a.

Judges McMillian and Bye dissented. McMillian maintained that the majority failed to follow *Lewis'* requirement that courts apply an "exact analysis" of "the totality of facts in a given case." 14a. He criticized the majority's mechanical application of *Lewis* despite evidence of deliberation by Burch and concluded that "the majority has created dangerous precedent whereby future courts applying the rule of this case have no choice but to blindly apply a rule of law without regard to the facts." 11a.

Judge Bye's dissent, joined by Judge McMillian, maintained that the "deliberate indifference" standard should apply, but even if it does not, that petitioner's claim survived summary judgment even under the higher "intent to harm" standard of *Lewis*. 17a. He noted "Burch's abuse of executive power" was not "incidental to a *legitimate* law enforcement objective. Officer Burch's

use of deadly force against a fleeing misdemeanant constituted a completely unreasonable use of force in violation of clearly established law." 24a.

REASONS FOR GRANTING THIS WRIT

As the Eighth Circuit's *en banc* opinion demonstrates, this case presents an important question and provides a timely opportunity for further guidance from this Court. The court below has erred, impermissibly expanding this Court's holding in *Sacramento v. Lewis*. The effect of the Eighth Circuit's decision is to allow police officers to conduct high-speed police pursuits without any meaningful constitutional limitations on their actions. *Lewis* dealt with claims of a chase suspect and involved no opportunity for, or evidence of, either deliberation or intent to harm the suspects. *Lewis* is unworkable as applied to cases such as this one, which involved a pursuit in which Burch, the pursuing officer, intentionally used his squad car as a weapon, and deliberately chose to continue a pursuit with the knowledge that innocent bystanders would be in danger.

At a number of points during a lengthy chase, and long after his colleague had decided to abandon the pursuit, Burch opted for the path of greatest danger, both to Contois and his passengers and the innocent public. By eliminating a substantive due process cause of action under these facts, the Eighth Circuit improperly applied *Lewis*.

I. Certiorari Should be Granted to Determine Whether the Facially Legitimate Objective of Arrest in a High-speed Chase Precludes a Substantive Due Process Analysis of Police Conduct That Evidences an "Intent to Harm Suspects" Under *Lewis*.

The Eighth Circuit's holding, if allowed to stand, will significantly alter the way police pursuits are conducted. The court's holding authorizes the knowing and intentional use of deadly force on a misdemeanant fleeing in a vehicle. The holding allows police officers to use any and all means to apprehend fleeing suspects, as long as their actions are related to the legitimate object of arrest. The Eighth Circuit has distorted this Court's holding in *Lewis*, vitiating the "intent to harm suspects" standard by refusing to consider evidence of such intent in a high-speed chase context.

A. Intentional and Multiple Use of Deadly Force Constitutes Evidence Under *Lewis* of "a Purpose to Cause Harm Unrelated to the Legitimate Object of Arrest."

The Eighth Circuit has impermissibly held that the consciously-employed, and impermissible use of deadly force on the driver of a fleeing vehicle and his three innocent juvenile passengers on four separate occasions "does not permit an inference of intent to harm under *Lewis*." 9a (quoting *Davis v. Township of Hillside*, 190 F.3d 167, 171 (3rd Cir. 1998)). The majority concluded that "[t]he only harm intended by this conduct was incidental to Burch's legitimate objective of arresting Contois, the driver of the fleeing vehicle. That intent does not, as a

matter of law, establish a substantive due process violation." 10a.

The Eighth Circuit relied on the Third Circuit's decision in *Davis*, which involved a high-speed pursuit of indeterminate duration of a stolen car. The chase was concluded by a "bump" or "ram," causing the suspect driver to hit his head, lose control of the vehicle and ultimately strike a pedestrian, severely injuring him. The record does not reveal whether the "bump" or "ram" was intentional or whether the action constituted a misuse of the squad car, and is silent on the officer's record for misuse of his squad car. The Third Circuit majority stated: "That physical contact of some sort between the pursued and pursuing vehicles might occur in the course of a high-speed chase, particularly at its conclusion is foreseeable. It would undermine *Lewis'* premise to limit liability to conscience shocking conduct if courts were to segment a high-speed chase and examine elements in isolation from each other." *Davis*, 190 F.3d at 171. There was no consideration of the officer's misuse of a 4,000-pound police cruiser as an instrumentality of deadly force under state statutes or departmental rules. There was no analysis of the officer's conduct as use of deadly force under *Tennessee v. Garner*, 471 U.S. 1 (1985), which held that use of deadly force on fleeing misdemeanants is impermissible under the Fourth Amendment.

In a concurring opinion, Judge McKee took issue with the majority's statement that "*Lewis* does not permit an inference of intent to harm simply because a chase eventuates in deliberate physical contact causing injury," stating:

> I must respectfully disagree with the breadth of that statement. I think the validity and the strength of any such inference depends entirely upon the totality of circumstances surrounding the contact, including the severity of the contact. The Supreme Court was careful to except from its holding cases where there was an intent to harm, terrorize or kill. I believe that there may well be those rare situations where the nature of an officer's "deliberate physical contact" is such that a reasonable fact finder would conclude the officer intended to harm, terrorize or kill.
>
> . . . *Lewis* establishes as a matter of law that the circumstances of the chase at issue there were insufficient to establish the required intent. It did not abrogate the rules of deductive reasoning and common sense that juries use every day.

Davis, 190 F.3d at 174-75 (McKee, J. concurring).

As Judge Bye points out in his dissent below, Burch's use of deadly force against a fleeing misdemeanant "constituted a completely unreasonable use of force in violation of clearly established law." 24a. The clearly established law included use of deadly force prohibited by the Fourth Amendment. *See Tennessee v. Garner*, 471 U.S. at 12 (noting the Fourth Amendment prohibits the use of deadly force upon a fleeing misdemeanant, stemming from English common law and adopted by most American jurisdictions). The clearly established law also included the prohibitions of Minnesota Statute § 609.066 (1994), which limits the use of deadly force in Minnesota.[6]

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[6] Minnesota Statute § 609.066, subd. 1 (1994) defines deadly force as "force which the actor uses with the purpose of causing,

As the district court found, respondent Burch was keenly aware, from his training and experience, that using a PIT maneuver against a car moving at high speeds causes a high probability of serious injury or death. Yet, Burch used the maneuver at least four times while the vehicle was moving at high speeds, under conditions that plainly did not justify use of deadly force.[7]

Abuses of executive police power have historically occurred during institutionally foreseeable and facially legitimate police practices, be it arrest (*Tennessee v. Garner*) or the collection of evidence (*Rochin v. California*, 342 U.S. 165 (1952)). Facially legitimate police practices cannot, in themselves, preclude a due process claim or constitutional analysis. "[T]he mere fact that force may have

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or which the actor should reasonably know creates a substantial risk of causing, death or great bodily harm." Minn. Stat. § 609.066, subd. 2(2) allows its use " . . . only when necessary . . . to effect the arrest or capture, or prevent the escape of a person whom the peace officer knows or has reasonable grounds to believe, has committed or attempted to commit a felony involving the use or threatened use of deadly force."

[7] The district court explained that Burch's training and experience and departmental policies on use of deadly force, including the PIT maneuver, mirror the proscriptions against the use of deadly force set forth in *Tennessee v. Garner* and Minn. Stat. § 609.066. The agency's own departmental policies and officer training based on the policies were developed to both reasonably comply with the Constitution and the state statute and set the limits of reasonableness for the officers within that agency. In *Tennessee v. Garner*, this Court noted the importance of police departmental policies giving due deference to "rules adopted by those who must actually administer them." 471 U.S. at 18-19.

been used while effectuating an arrest does not automatically establish that the force was 'in relation' to a *legitimate object* of the arrest under a § 1983 analysis." *Davis*, 190 F.2d at 172 (McKee, J. concurring) (emphasis added). Similarly, in his dissent below, Judge Bye stated, "I cannot view Burch's abuse of executive power as incidental to a *legitimate* law enforcement objective." 24a (emphasis in original).

Although it is understandable to limit the use of substantive due process generally, *see Washington v. Glucksberg*, 521 U.S. 702, 720 (1997), a substantive due process remedy is appropriate for a case such as this, where an officer's conduct is both manifestly arbitrary and intentionally violative of previously-established constitutional and statutory limits on his executive authority. The Fourteenth Amendment should provide a remedy against a state actor, uninhibited by the Fourth Amendment and similar state statutory limitations against the use of deadly force. Had Burch been successful in causing death or substantial bodily harm by ramming Contois and the three juveniles (and perhaps others struck by their vehicles), a Fourth Amendment cause of action would clearly lie against him, *see Tennessee v. Garner*, 471 U.S. 1, as the majority below acknowledged. 10a n.4. It is wrong to conclude, as a matter of law, that the same conduct, so clearly violative of established law, *if unsuccessful*, is not evidence of the intent requirement in a substantive due process violation under the Fourteenth Amendment, simply because an arrest, particularly a misdemeanor arrest, was the end game.

B. Intentional and Multiple Use of Deadly Force On a Fleeing Suspect Violates Clearly Established Law.

The effect of the Eighth Circuit opinion below is to create a "high-speed pursuit" exception to the fundamental obligation of law enforcement officials to respect "certain decencies of civilized conduct" even when carrying out their official duties so long as an arrest was the goal. That result violates the long-established principle that law enforcement officials may not act in a manner that "shocks the conscience" even when their actions relate, no matter how tenuously, to the otherwise facially legitimate object of obtaining credible evidence or prosecuting criminal behavior. *See Rochin*, 342 U.S. 165.

In this case, as in *Rochin*, Burch should be liable because, even in the context of enforcing the law, "the Due Process clause [is] intended to prevent government officials from abusing their power, or employing it as an instrument of oppression." *Lewis*, 523 U.S. at 840. In this case, the ends do not justify the means. The majority below ignores the constitutional gravity of allowing such a misuse of deadly force in the context of a high-speed pursuit. Whether the exception crafted by that opinion stems from the *circumstance* of its use, a high-speed pursuit, or from the *instrument* of the force, a police cruiser instead of a firearm, the anomaly remains as dangerous precedent, eroding much of the constitutional protection afforded by *Tennessee v. Garner*.

Tennessee v. Garner dealt with deadly force in a Fourth Amendment context, but its logic and the constitutional principle of limiting the abuse of executive power apply equally in a Fourteenth Amendment analysis. The Court

in *Tennessee v. Garner*, stated, "there can be no question that the apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment. . . . " 471 U.S. at 7. The Court noted "a police officer may arrest a person if he has probable cause to believe that a person has committed a crime." In *Garner*, the State of Tennessee and the Memphis Police Department argued that, if this requirement is satisfied, the Fourth Amendment has nothing to say about how the seizure is made. The Court disagreed, and held that the Fourth Amendment had very much to say about the seizure and applied the Fourth Amendment's reasonableness test to measure what the Fourth Amendment proscribed. *Id.* at 7-8.

The majority below, however, has held that, in a high-speed pursuit with arrest as an objective, the Fourteenth Amendment has nothing to say about police conduct directed toward the subject of the arrest or those in the vehicle with the subject. That is, if the police officer has probable cause to believe that the driver of the vehicle committed any crime in a high-speed chase situation, any conduct directed toward the occupants of the vehicle, no matter how arbitrary, no matter how abusive of executive power, and no matter whether the conduct violates clearly established law on the use of deadly force, such conduct cannot, as a matter of law, "shock the conscience" of civilized society in a Fourteenth Amendment context. This conclusion defies clearly established constitutional protections: "The intrusiveness of a seizure by means of deadly force is unmatched. The suspect's fundamental interest in his own life need not be elaborated upon. The use of deadly force also frustrates the interest of the individual, and of society, in judicial termination of

guilt and punishment." *Id.* at 9. These are rights sufficient to be protected by substantive due process. *See United States v. Salerno*, 481 U.S. 739, 746 (1987).

Respondent Burch argues that he was "vigilantly attempting to apprehend the fleeing suspect," who was "a danger to the general public." His express and implied arguments are essentially those posited – and rejected – by Tennessee and the City of Memphis in *Tennessee v. Garner*. They argued that the general governmental interest in effective law enforcement was furthered; "that overall violence will be reduced by encouraging the peaceful submission of suspects who know that they may be shot if they flee"; and that "effectiveness in making arrests requires the resort to deadly force or else the meaningful threat thereof." 471 U.S. at 9. This Court emphatically rejected those arguments:

> Without in any way disparaging the importance of these goals, we are not convinced that the use of deadly force is a sufficiently productive means of accomplishing them to justify the killing of nonviolent suspects. . . . And while the meaningful threat of deadly force might be thought to lead to the arrest of more live suspects by discouraging escape attempts, the presently available evidence does not support this thesis. The fact is that a majority of police departments in this country have forbidden the use of deadly force against nonviolent suspects.

Garner, 471 U.S. at 10-11. Thus, the Court found that "the use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is unconstitutionally unreasonable. It is not better that all felony suspects die than that they escape." *Id.*

Garner also considered the argument made by Tennessee and the Memphis Police Department that "the rule we have adopted requires the police to make impossible split second evaluations of unknowable facts." 471 U.S. at 20. The Court noted that, "similarly difficult judgments must be made by the police in equally uncertain circumstances." *See, e.g.*, Terry v. Ohio, 392 U.S. 1 at 20, 27 (1968). From a police agency perspective, the Blaine Police Department, like many others locally, regionally and nationally, mandates that:

> Officers involved in a pursuit *must continually question* whether the seriousness of the violation reasonably warrants continuation of the pursuit. A pursuit shall be discontinued when there is a clear danger to the pursuing officers or the public. . . . The pursuing officers *must consider* present danger, seriousness of crime, length of pursuit, whether or not the application of deadly force by the pursuing Officer is justified, and the possibility of identifying the suspect at a later time when determining whether or not to continue the pursuit.

(A333).

The majority opinion below does not overtly deal with the notion that intentional use of the PIT maneuver is unauthorized use of deadly force, but nevertheless creates a high-speed pursuit exception to its improper usage. Such an exception "must be viewed with suspicion in light of similar self-imposed restrictions of so many police departments," *Tennessee v. Garner*, 471 U.S. at 20, not to mention the holding of *Tennessee v. Garner* and the language of Minn. Stat. § 609.066.

A rule permitting misuse of a police vehicle in ways proscribed by *Tennessee v. Garner*, Minn. Stat. § 609.066, and police agency regulations governing the use of such vehicles runs contrary to the exception crafted in *Sacramento v. Lewis*. There, the Court held "that high-speed chases with no intent to harm the suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressible by an action under 1983." But the Court took pains to note that "[i]t is a different story when a citizen suffers or is seriously threatened with physical injury due to a police officer's *intentional misuse* of his vehicle." 523 U.S. at 854 n.13 (emphasis in original).

There can be no greater abuse of executive power than in the case of intentional misuse of a vehicle by an officer amounting to an unauthorized and proscribed use of deadly force. When police power is misused in this context, it is foreseeable that the target of improper deadly force will continue to flee rather than be killed, resulting in heightened danger to innocent civilians and the grave injuries this lawsuit seeks to redress.

By not addressing the misuse of deadly force, the Eighth Circuit below and the Third Circuit in *Davis* have improperly expanded this Court's opinion in *Sacramento v. Lewis*. These cases eviscerate the remedy created for true abuses of executive power, none so important as those relating to the use of deadly force. Unfortunately, the decision to ram or PIT suspects' vehicles is a recurrent one, subject to constitutional, statutory and departmental prohibitions. Such prohibitions have been eradicated by the opinion below. *Sacramento v. Lewis* did not sufficiently guide the lower courts on this question of the constitutional limits on intentional use of deadly

force. Lower courts need to know if a substantive due process claim in a high-speed chase is limited to the truly bizarre facts of *Checki* or if an intentional and arbitrary abuse of the most important executive power to use deadly force on any citizen, through misuse of a police vehicle, will support such a claim.

II. Certiorari should be granted to clarify whether *Sacramento v. Lewis* applies to claims brought by innocent bystanders injured in police pursuits.

The Eighth Circuit has improperly and erroneously extended this Court's holding in *Lewis* to apply to innocent bystanders, such as petitioner Tim Helseth, who are injured in police pursuits. *Lewis* involved a suspect and chase participant and, as such, the Court adopted a state of mind requirement directed towards suspects. *Lewis'* intent to harm suspects standard is unworkable as applied to substantive due process claims brought by innocent bystanders.

In his dissent below, Judge Bye addressed the problem of applying the "intent to harm" standard to claims brought by innocent third parties:

> . . . the "intent to harm suspects" standard adopted by the Supreme Court fits ill with the type of § 1983 claim involved here – that of an innocent motorist injured as the result of a high-speed pursuit. Oddly, under the Supreme Court's test, an innocent motorist need not prove that an officer intended to harm *him*, but that the officer intended to harm a *suspect*. Why are we concerned with an officer's intent to harm a suspect, a juror might wonder, when the innocent motorist's constitutional rights are at

> stake? The "deliberate indifference" test is more compatible with the § 1983 claim of an innocent motorist, who would then be required to prove deliberate indifference to his own constitutional rights.

20a.

This Court's belief that the "intent to harm suspects" standard be applied only to fleeing *suspects*, rather than innocent bystanders, is made apparent in the concurring opinion of Justice Kennedy (joined by O'Connor, J.). He wrote:

> No matter how narrow its formulation, any suggestion that *suspects* may ignore a lawful command to stop and then sue for damages sustained in an ensuing chase might cause *suspects* to flee more often, increasing accidents of the kind which occurred here.

Lewis, 523 U.S. at 858. (Kennedy, J., concurring) (emphasis added). Justice Kennedy's concern that fleeing suspects might sue for damages has no application to the substantive due process claims of an innocent bystander, such as Tim Helseth.

Because the decedent in *Lewis* was one of the chase participants, the defendant officers in *Lewis* could have formed an intent to harm him physically or worsen his legal plight. In dismissing that case, this Court found that such an intent was not established in the record. In this case, however, because Tim Helseth was an innocent third party, it is both illogical and difficult, if not impossible, to workably use the *Lewis* analysis. The Eighth Circuit's extension of the *Lewis* standard to the claims of an innocent bystander was a misapplication of *Lewis* and

warrants review to clarify that a deliberate indifference standard applies to cases involving injury or death to an innocent bystander.

III. Certiorari Should Be Granted to Clarify Whether This Court Adopted a "Bright-line" Standard in *Lewis* That Precludes a Finding of Deliberation By Officers Involved in High-Speed Police Pursuits.

A. *Lewis'* "Shocks the Conscience" Standard Cannot Be Rigidly Applied to All Police Pursuit Cases Without Regard to Their Particular Facts

The Eighth Circuit majority failed to follow *Lewis*, but instead adopted a per se rule to be applied in all high-speed chase cases, regardless of their particular facts. In *Lewis*, this Court held that "denial of due process is to be tested by an appraisal of the totality of the facts in a given case." 523 U.S. at 853. This Court specifically recognized there are circumstances where conduct, which is more than negligent but less than intentional, may still be egregious enough to state a substantive due process claim. *Id.* at 848. This Court implicitly recognized that "intent to cause harm" is *not always necessary* for a finding that particular conduct "shocks the conscience." *Id.* at 852-53. The Court held "rules of due process are not . . . subject to mechanical application . . . [O]ur concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience-shocking." *Id.* at 850.

The Eighth Circuit majority seemingly ignored this Court's "concern" with substantive due process analysis and instead rigidly applied the "intent to harm" standard to an egregious high-speed pursuit that significantly differed from the short pursuit in *Lewis*. The majority erroneously concluded that "*Lewis* plainly stated that the intent-to-harm standard, rather than the deliberate indifference standard, applies to *all* high-speed police pursuits aimed at apprehending suspected offenders." 7a. (emphasis in original). The majority also noted that "we find no basis to infer that a majority of the [Supreme] Court would now retreat from *Lewis'* bright-line standard and adopt the fact-intensive, hindsight-oriented approach of the panel in *Feist*." 7a n.2 (referring to the prior panel decision effectively overruled by the *en banc* decision below). In fact, the Eighth Circuit majority misinterpreted this Court's holding in *Lewis*, which expressly left open a substantive due process cause of action in a high-speed chase context.

In his dissent below, Judge McMillian maintained that this Court did not adopt a *per se* rule that the "intent to harm" standard should be blindly applied in all police pursuit cases. 11a. He noted that "[e]very principle of law turns upon the factual background of the given case." 13a. He criticized the majority's "rubber-stamping" of this Court's *Lewis* holding and argued that "intervening acts, such as egregious acts beyond instantaneous reactions, that is, when actual deliberation is practical, could warrant the application of the deliberate indifference standard." 12a.

The majority's blind adherence to the intent-to-harm standard has created an "anything goes" rule in high-

speed chases that forecloses a finding of a substantive due process violation absent now-almost-unprovable intentional harm. It has rendered considered, but more restrictive, departmental policies mandating deliberation meaningless. The Eighth Circuit majority failed to recognize that this Court expressly ruled that the deliberate indifference standard could appropriately be applied in some substantive due process cases. Because there is overwhelming evidence of deliberation by Officer Burch, in this case the deliberate indifference standard should be applied.

B. The "Exact Analysis of Circumstances" of the Pursuit in This Case Distinguishes It From *Lewis* and Warrants Application of the "Deliberate Indifference" Standard.

Police pursuits often require officers to make split-second decisions, but it does not necessarily follow that all such decisions are without deliberation. The Eighth Circuit's decision below wrongly implies that high-speed police pursuits provide no opportunity for deliberation, as a matter of law. The Eighth Circuit misinterpreted this Court's holding in *Lewis* in finding that all police pursuits, regardless of their particular facts, are undertaken and concluded without deliberation.

The premise that police officers are unable to deliberate during the course of a high-speed police chase is unsupportable, given the facts of this case and the level of training and professionalism attained by many police officers. Respondent Burch was both trained to act, and admittedly did act, deliberately in pursuing the Contois

vehicle. His deliberation throughout the chase demonstrates why police pursuit cases must be determined on a case-by-case basis rather than by the adoption of a bright-line rule which eliminates the possibility of deliberation altogether. In this regard, the majority below strayed from the constitutional protections outlined in *Lewis*. In circumstances in which deliberation is practical, deliberate indifference meets the required "conscience-shocking" test.

This chase was not like the pursuit in *Lewis*, which required an "instantaneous" and "instinctive response" with no time for deliberation. Among other things, Burch conceded that he had time to consider the damage he had done to Contois' vehicle and the likelihood of its being able to continue the chase. (A481). Burch had time to consider whether to continue the chase into another police jurisdiction. (A482). Burch considered the heavy use by the driving public of the cross streets intersecting the chase route (A479) and was worried that those cars would not have much warning of the chase. (A487-88). In short, Burch was able to fully consider all of the options before him and the potential consequences of his conduct on Contois and others.

The Eighth Circuit below attempts to improperly transform *Lewis* into a "categorical rule" or "bright-line standard" that contravenes the reason for substantive due process protection: to protect against systemic governmental interference with important individual rights. The Eighth Circuit's distorted reading of *Lewis* affronts not only the professionalism of the vast majority of police officers, based on proper training and experience with constitutional and statutory boundaries, but also *Lewis'*

mandate requiring an "exact analysis" of the totality of the facts in a given case. The Eighth Circuit has given a green light to officers like Burch who refuse to conform their conduct in high-speed chases to that required by the Constitution, state statutes, and departmental rules. Several states, including Minnesota, do not provide a state remedy to protect the fundamental right to life of the driving public. It is then imperative that the federal court do so. Since the Eighth Circuit has taken this erroneous approach, certiorari should be granted to guide the lower courts on this important question of whether factual inquiry is foreclosed or mandated in such cases.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals,
Eighth Circuit.

Timothy HELSETH, Plaintiff-Appellee,

v.

John BURCH, in his individual capacity, Defendant-Appellant,

No. 00-3235.

Submitted: Jan. 11, 2001.
Filed: July 31, 2001.

Motorist who was severely injured when struck by fleeing suspect during high-speed chase brought action against pursuing officer and his municipal employer, claiming deprivation of his Fourth and Fourteenth Amendment rights. On defendants' motion for summary judgment, the United States District Court for the District of Minnesota, John R. Tunheim, J., 109 F.Supp.2d 1066, denied officer qualified immunity on substantive due process claim and officer appealed. On rehearing en banc, the Court of Appeals, Loken, Circuit Judge, held that: (1) overruling Feist v. Simonson, 222 F.3d 455, intent-to-harm standard, rather than the deliberate indifference standard, applies to all § 1983 substantive due process claims based upon the conduct of public officials engaged in a high-speed automobile chase aimed at apprehending a suspected offender, and (2) officer's pursuit of fleeing suspect did not shock the conscience, and thus did not violate due process rights of motorist.

Reversed and remanded.

McMillian, Circuit Judge, dissented and filed an opinion.

Bye, Circuit Judge, filed opinion concurring in part and dissenting in part, in which McMillian, Circuit Judge, joined in part.

Jon K. Iverson, Minneapolis, MN, argued (Paul D. Reuvers and Jason J. Kubourshek, Minneapolis, on the brief), for appellant.

Robert Bennett, Minneapolis, MN, argued (Heidi A. Schneider and Eric Hageman, Minneapolis, on the brief), for appellee.

Before WOLLMAN, Chief Judge, McMILLIAN, RICHARD S. ARNOLD, BOWMAN, BEAM, LOKEN, HANSEN, MORRIS SHEPPARD ARNOLD, MURPHY, and BYE, Circuit Judges.

LOKEN, Circuit Judge.

In *County of Sacramento v. Lewis*, 523 U.S. 833, 835, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998), the Supreme Court held that "in a high-speed automobile chase aimed at apprehending a suspected offender . . . only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a [substantive] due process violation." In *Feist v. Simonson*, 222 F.3d 455, 464 (8th Cir.2000), which involved a high-speed pursuit of a stolen car, a panel of this court declined to apply the intent-to-harm standard of *Lewis* because the police officer "had ample time to deliberate" during the six-minute chase. In this case, an intoxicated driver seriously injured Timothy Helseth while being pursued at high speed by police officer John Burch. Relying on *Feist*, the district court

denied Burch qualified immunity from Helseth's substantive due process claim under 42 U.S.C. § 1983. *Helseth v. Burch,* 109 F.Supp.2d 1066, 1078 (D.Minn.2000). Burch appealed, and we granted his petition for initial en banc review.[1] We overrule *Feist* and reverse.

I. Background.

Shortly after midnight on August 22, 1995, an intoxicated Everett Contois raced his car on a straight stretch of road in Blaine, Minnesota, a Twin Cities suburb. Contois's car was traveling 111 mph when it passed Blaine police officer William Bott in his squad car. Bott began pursuit, activating his lights and siren and notifying the police dispatcher of the chase. After Contois had successfully evaded Bott for several miles, running stop signs and stoplights at speeds of 60 to 80 mph, he raced passed Burch, who joined the chase as the lead squad car.

With Burch in close pursuit, Contois drove through four stop signs, stopped briefly in a dead-end cul-de-sac, and then drove through two lawns and over a small retaining wall to another street. As Contois slowed to make a right turn, Burch attempted to stop the Contois vehicle with three Pursuit Intervention Tactics ("PIT") maneuvers, in which the officer drives alongside the rear of the fleeing vehicle, turns, and hits the vehicle's rear

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[1] The parties in *Feist* settled while the officer's petition for rehearing en banc was pending. The petition was then dismissed, with four judges dissenting. 222 F.3d at 465. Only the court sitting en banc may overrule the *Feist* panel decision. *See United States v. Missouri Valley Constr., Co.,* 741 F.2d 1542, 1546 (8th Cir.1984).

end, causing it to spin and stop. The third PIT spun Contois's vehicle into a grassy median, but Contois quickly sped off, heading in the wrong direction on Highway 10, a heavily traveled thoroughfare. Another PIT maneuver again spun Contois into the median, but he reentered Highway 10 (now heading in the right direction) and accelerated to speeds of 80 to 100 mph. Contois turned onto Highway 65 and then 81st Avenue, entering the neighboring suburb of Spring Lake Park, where another police car joined the pursuit. Just over six minutes after Burch entered the chase, Contois ran a red light and collided with a pickup truck driven by Helseth. The crash killed Helseth's passenger, seriously injured three juvenile passengers in Contois's car, and left Helseth a quadriplegic. Contois was tried and convicted of third degree murder and other offenses in state court.

Helseth filed this § 1983 damage action against Burch, alleging numerous constitutional violations arising from Burch's high-speed pursuit of Contois's vehicle. After substantial discovery, Burch moved for summary judgment. The district court dismissed all but Helseth's substantive due process claim. As to that claim, applying *Feist*, the court denied Burch qualified immunity because the evidence could support a finding that Burch conducted the pursuit with deliberate indifference to public safety and Helseth's rights. Alternatively, applying *Lewis*, the court denied Burch qualified immunity because the evidence could support a finding that Burch intended to harm Contois and his passengers by engaging in the PIT maneuvers. Burch appeals the denial of qualified immunity. As *Lewis* makes clear, in considering the qualified immunity defense, we must "determine first whether the

plaintiff has alleged a deprivation of a constitutional right at all." 523 U.S. at 841 n. 5, 118 S.Ct. 1708. That is an issue we review *de novo. Elder v. Holloway,* 510 U.S. 510, 516, 114 S.Ct. 1019, 127 L.Ed.2d 344 (1994).

II. The Proper Culpability Standard.

Lewis reaffirmed that the substantive component of the Due Process Clause protects a private citizen against an abuse of power by an executive official that "shocks the conscience." *Lewis* involved a § 1983 damage claim by a motorcycle passenger injured at the end of a deputy sheriff's high-speed chase. The Ninth Circuit reversed the grant of summary judgment to the deputy, concluding that "the appropriate degree of fault to be applied to high-speed police pursuits is deliberate indifference to, or reckless disregard for, a person's right to life and personal security." *Lewis v. Sacramento County,* 98 F.3d 434, 441 (9th Cir.1996). The Supreme Court reversed. The Court explained that the task was to determine the level of culpability which *in this context* "is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." 523 U.S. at 848 n. 8 & 849, 118 S.Ct. 1708. For high-speed police pursuits, the Court rejected the deliberate indifference standard, which it characterized as a "midlevel" fault standard. Analogizing such pursuits to prison riots, the Court concluded that "only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation." 523 U.S. at 836, 118 S.Ct. 1708.

Feist involved a high-speed police chase that ended when the stolen car being pursued hit Feist's vehicle head-on at 100 mph. Eschewing the intent-to-harm standard of *Lewis*, our panel affirmed the denial of qualified immunity to the pursuing police officer, concluding that the deliberate indifference standard applies to a high-speed pursuit case if the pursuing police officer "had ample time to deliberate . . . [and] made a deliberative decision to continue the chase and to be indifferent to the dangers obviously inherent in his conduct." 222 F.3d at 464. In this case, the district court concluded that the deliberate indifference standard should apply because Burch, like the police officer in *Feist*, "engaged in conscious deliberation rather than reflexive conduct." *Helseth*, 109 F.Supp.2d at 1076.

Our principal problem with the decision in *Feist* is that the panel paid too little heed to the Supreme Court's *holding* in *Lewis*, instead relying primarily on a portion of the Court's justification for that holding. The Court in *Lewis* was careful to state its holding in the first paragraph of the opinion – "in a high-speed automobile chase aimed at apprehending a suspected offender . . . only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a [substantive] due process violation." 523 U.S. at 836, 118 S.Ct. 1708. The Court restated its categorical rule toward the end of its opinion – "we hold that high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressible by an action under § 1983." *Id.* at 854, 118 S.Ct. 1708. For the lower federal courts, an

explicit Supreme Court holding is like a statute in that its plain language must be obeyed. *Accord Kinstler v. First Reliance Std. Life Ins. Co.*, 181 F.3d 243, 250-51 (2d Cir.1999). *Lewis* plainly stated that the intent-to-harm standard, rather than the deliberate indifference standard, applies to *all* high-speed police pursuits aimed at apprehending suspected offenders.[2]

To be sure, the Court in *Lewis* explained that the deliberate indifference standard is appropriate "only when actual deliberation is practical." 523 U.S. at 851, 118 S.Ct. 1708. The panel in *Feist* saw this language as an invitation to reject intent-to-harm as the governing standard whenever a judge or a jury could say, with the wisdom of hindsight, that an officer engaged in a high-speed pursuit had "ample time to deliberate." But this reasoning not only produces a standard that eviscerates the holding of *Lewis*, it also gives too little recognition to the Court's other bases for that holding – its historical reluctance "to expand the concept of substantive due process," 523 U.S. at 842, 118 S.Ct. 1708; its explicit

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[2] Six Justices joined Justice Souter's majority opinion in *Lewis*. Justice Stevens concurred in the judgment because he would have granted the deputy qualified immunity, thereby avoiding the constitutional issue. 523 U.S. at 859, 118 S.Ct. 1708. Justices Scalia and Thomas concurred in the judgment because they would have rejected the shocks-the-conscience standard and held that there is no "substantive-due-process right to be free from reckless police conduct during a car chase." 523 U.S. at 863, 118 S.Ct. 1708. Given this array of views and the clarity of the Court's holding, we find no basis to infer that a majority of the Court would now retreat from *Lewis*'s bright-line standard and adopt the fact-intensive, hindsight-oriented approach of the panel in *Feist*.

reliance on *Whitley v. Albers*, 475 U.S. 312, 320, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986), which adopted the intent-to-harm standard for a two-hour prison riot, 523 U.S. at 853-54, 118 S.Ct. 1708; its doubt whether "it makes sense to speak of indifference as deliberate in the case sudden pursuit," 523 U.S. at 851, 118 S.Ct. 1708; its recognition that police officers confronting high-speed lawlessness are "subject to countervailing [law] enforcement considerations," 523 U.S. at 855, 118 S.Ct. 1708; its concern that any standard less than intent-to-harm "might cause suspects to flee more often, increasing accidents of the kind which occurred here," 523 U.S. at 858, 118 S.Ct. 1708 (Kennedy, J., concurring); and the belief of at least some Justices that the question of police officer liability for reckless driving during high-speed pursuits should be decided by the elected branches of government, 523 U.S. at 864-65, 118 S.Ct. 1708 (Scalia, J., concurring).[3]

Since *Lewis*, all other circuits that have examined the issue have applied the intent-to-harm standard in high-speed police pursuits cases, without regard to the potentially limiting factors identified by the panel in *Feist* – the length of the pursuit, the officer's training and experience, the severity of the suspect's misconduct, or the perceived danger to the public in continuing the pursuit. *See Trigalet v. City of Tulsa*, 239 F.3d 1150, 1155 (10th Cir.2001); *Davis v. Township of Hillside*, 190 F.3d 167, 170 (3d Cir.1999), *cert. denied*, 528 U.S. 1138, 120 S.Ct. 982, 145

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[3] Under Minnesota law a police officer has official immunity from claims for injuries caused by his or her decision to engage in and continue a high-speed pursuit. *Pletan v. Gaines*, 494 N.W.2d 38, 41 (Minn.1992).

L.Ed.2d 932 (2000); *Onossian v. Block*, 175 F.3d 1169, 1171-72 (9th Cir.), *cert. denied*, 528 U.S. 1004, 120 S.Ct. 498, 145 L.Ed.2d 385 (1999); *Salamacha v. Lynch*, 1998 WL 743905, at *2 (2d Cir. Sept.25, 1998). We now join those circuits and overrule *Feist*. We hold that the intent-to-harm standard of *Lewis* applies to all § 1983 substantive due process claims based upon the conduct of public officials engaged in a high-speed automobile chase aimed at apprehending a suspected offender.

III. Did Officer Burch Intend To Harm?

Although we overrule *Feist*, we agree with its decision "that the *Lewis* intent standard applies regardless of whether a suspect or bystander is hurt." 222 F.3d at 462. *Accord Onossian*, 175 F.3d at 1171-72. The district court denied Burch summary judgment under the intent-to-harm standard because Burch's deliberate ramming of Contois's vehicle in four PIT maneuvers would permit a reasonable jury to "infer from these facts that Burch intended to harm Contois and the three juvenile passengers in his car." 109 F.Supp.2d at 1077.

The district court's decision conflicts with *Davis v. Township of Hillside*, 190 F.3d at 171, where the Third Circuit concluded that deliberate ramming of a fleeing suspect's car "does not permit an inference of intent to harm" under *Lewis*. We agree with the decision in *Davis*. In applying the *Lewis* standard, "only a purpose to cause harm *unrelated to the legitimate object of arrest* will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation." 523 U.S. at

836, 118 S.Ct. 1708 (emphasis added). Here, the undisputed evidence is that Burch employed the PIT maneuvers in an attempt to stop the fleeing Contois vehicle and apprehend its driver. The only harm intended by this conduct was incidental to Burch's legitimate objective of arresting Contois. That intent does not, as a matter of law, establish a substantive due process violation.[4]

Moreover, the PIT maneuvers failed in their objective, and Contois continued his high-speed flight. Contois eventually crashed into Helseth's vehicle, with Burch still in pursuit. At that time, Burch had no more intent to harm than that inherent in the high-speed pursuit of any suspected offender. On appeal, Helseth points to Contois's deposition testimony that he felt terrorized by Burch's aggressive pursuit and argues that this case is like *Checki v. Webb*, 785 F.2d 534 (5th Cir.1986), which the Court in *Lewis* cited as an example of intent to cause harm unrelated to the legitimate object of an arrest. 523 U.S. at 854 n. 13, 118 S.Ct. 1708. But unlike the law-abiding citizens in *Checki*, who were hounded for miles by police officers in an unmarked vehicle, Contois was a fleeing criminal, whose irresponsible high-speed driving endangered countless citizens and ultimately killed one innocent bystander and maimed another, Timothy Helseth.

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[4] Had Burch succeeded in stopping the Contois vehicle, his actions in effecting such a seizure would have been subject to a reasonableness challenge under the Fourth Amendment. *See Brower v. County of Inyo*, 489 U.S. 593, 599-600, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989). But Contois eluded arrest and resumed his flight. A § 1983 claim challenging Burch's continued pursuit must be based upon substantive due process. *See Lewis*, 523 U.S. at 842-45 & n. 7, 118 S.Ct. 1708.

Burch and the other police officers who risked their lives to remove this menace from the public highways were not guilty of a conscience-shocking intent to harm.

Society could reasonably decide that an innocent bystander injured during such high-speed police pursuits should be compensated from the public coffers. But that is a legislative decision. There was no violation of Helseth's rights under the Due Process Clause. The August 18, 2000, order of the district court is reversed in part, and the case is remanded for entry of an order dismissing Helseth's § 1983 complaint.

McMILLIAN, Circuit Judge, dissenting.

I join in Part II of Judge Bye's opinion concurring in part and dissenting in part, because, assuming for purposes of analysis that the Supreme Court adopted a per se rule in *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) (*Lewis*), I agree that there was sufficient evidence of intent to harm to defeat the motion for summary judgment on the basis of qualified immunity. I also agree with Judge Bye's comments criticizing the *Lewis* analysis, but I write separately to explain why I do not agree that the Supreme Court adopted a per se rule in *Lewis*, and why I think that the old axiom that hard cases sometimes make bad law applies to the difference between the majority opinion and the earlier panel opinion in *Feist v. Simonson*, 222 F.3d 455 (8th Cir.2000) (*Feist*). The result is that the majority has created dangerous precedent whereby future courts applying the rule of this case have no choice but to blindly apply a rule of law without regard to the facts.

Unfortunately, the two senior judges who sat on *Feist* did not have an opportunity to hear this case argued because the en banc panel involved only active judges. My main concern relates to the statement of the majority opinion that the panel in *Feist* paid too little heed to the Supreme Court's holding in *Lewis*, and instead relied primarily on "a portion of the Court's justification for that holding." *See supra* p. 871. Although I am not sure exactly what the latter phrase means, to hold that the panel in *Feist* paid too little heed to the Supreme Court's holding in *Lewis* totally obfuscates an analytical reading of the *Feist* opinion.

The majority opinion extracts from *Lewis* a categorical rule that once an officer instantaneously engages in a high-speed automobile chase of a suspected criminal – regardless of what intervenes after the instantaneous pursuit – no substantive due process violation occurs absent intentional harm. *See supra* pp. 871 & note 2. *Feist* took the position that the *Lewis* Court did not intend to create a mechanical rule to be applied blindly, and that intervening acts, such as egregious acts beyond instantaneous reactions, that is, when actual deliberation is practical, could warrant the application of the deliberate indifference standard. 222 F.3d at 461. *Lewis* says exactly that. 523 U.S. at 851, 118 S.Ct. 1708.

Justice Souter's thorough examination of this issue clearly denounces applying the *Lewis* holding "like a statute in that its plain language must be obeyed." *See supra* p. 871. Nevertheless, the majority opinion interprets *Lewis* to say that "the intent-to-harm standard, rather than the deliberate indifference standard, applies to *all*

high-speed police pursuits aimed at apprehending suspected offenders." *See supra* p. 871 (emphasis added). One must give the Supreme Court greater credibility than simply applying *Lewis*, absent an evaluation of the facts of a given case.

Every principle of law turns upon the factual background of the given case. To hold otherwise ignores Justice Souter's admonition in *Lewis:*

> Rules of due process are not, however, subject to mechanical application in unfamiliar territory. Deliberate indifference that shocks in one environment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking. What we have said of due process in the procedural sense is just as true here:
>
> The phrase [due process of law] formulates a concept less rigid and more fluid that [sic] those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.

523 U.S. at 849, 118 S.Ct. 1708, *citing Betts v. Brady*, 316 U.S. 455, 462, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942).

Clearly, the "exact analysis of circumstances" in a given case requires more than rubber-stamping a particular rule of law. To suggest the Supreme Court endorsed such a mechanical approach in *Lewis* fails to give any sense of jurisprudential credit to the highest court of the land. *Lewis* requires that we apply the "exact analysis" of "the totality of facts in a given case." The holding in *Lewis* may deny recovery as to the high-speed chase involved in this case. However, *Feist* is clearly distinguishable from both this case and *Lewis*.

As the panel in *Feist* explained, what began as an instantaneous pursuit by Officer Simonson in a high-speed chase changed significantly along the way. The *Feist* panel placed great reliance upon the specific findings of fact made by the district judge:

> [w]hile Officer Simonson should be afforded deference for his initial decision, the contention that he did not have the time or ability to clearly assess the rising levels of potential danger in the situation should be subject to further analysis. *At many points during the chase, Simonson had the opportunity to balance the law enforcement goal of apprehending Shannon for use of a stolen vehicle (a low-level penalty likely carrying no prison time) against the threat to the general public.* Each new turn onto one-way streets and especially the accessing the freeway to drive on the wrong side of the median, presented a juncture for reassessment and evaluation of the escalating consequences of the chase. Rather than aborting the chase as the danger increased, the speed and number of pursuing vehicles also increased. . . . A review of Simonson's conduct, in light of *Lewis* and other established precedent, reveals

> that genuine issues of fact exist as to whether his actions "shocked the conscience" for the purpose of a substantive due process claim.

Mem. op. and order at 18-19 (emphasis added), *cited in Feist*, 222 F.3d at 461. Those findings of fact should not and cannot be set aside unless they are clearly erroneous. In *Feist* no one argued that the district judge's findings were clearly erroneous.

In *Lewis* the high-speed chase involved seventy-five seconds. In *Feist* it extended over six minutes. The majority opinion in overruling *Feist* ignores the fact that Officer Simonson made a conscious decision to pursue the driver of the fleeing vehicle and follow it at speeds of seventy miles per hour, traveling the wrong direction down Interstate Highway I-94, covering 1.2 miles, as well as pursuing the fleeing automobile the wrong way down several one-way streets. Each time Simonson pursued on a one-way street, he deliberately chose to use the on-coming vehicles as a moving blockade against the fleeing juveniles. *Simonson had been trained by the Minneapolis Police Department not to duplicate the path of the fleeing driver, not to chase when to pursue would put the public in danger and to reflect upon the wisdom of each escalation of the pursuit. Notwithstanding such training, Simonson deliberately chose to increase the danger to the public. Simonson proceeded in deliberate disregard of that training.*

In addition to eschewing the egregious conduct of Officer Simonson, the majority opinion here did not examine the testimony in *Feist*. Other officers testified at trial that Simonson had created an unreasonable risk of danger to the public by pursuing the fleeing vehicle and driving through the I-94 tunnel the wrong way. This

compelling evidence supported the district court's conclusion that "Simonson's instinctive decision to give chase slowly escalated into a high-speed chase involving wrong-way travel, thereby increasing the potential for harm to the general public." 222 F.3d at 461.

In conclusion, let me say that in *Feist* the unconstitutional action of Officer Simonson was not based upon his initial decision to pursue the fleeing vehicle (indeed, *Feist* agreed with the district court that the instantaneous judgment and reaction were fully justified, *see id.* at 461, 464), but upon the intervening facts, the most significant of which was Simonson's decision, after actual deliberation, to pursue the fleeing vehicle the wrong way on one-way streets and onto the interstate highway, through a darkened tunnel, into oncoming traffic. *See id.* at 464.

If the majority opinion's interpretation of *Lewis* is that no high-speed pursuits by police officers, regardless of intervening events, including actual deliberation, provide a substantive due process claim absent intent to cause harm, then obviously *Feist* was wrongly decided. However, the panel in *Feist* rejected a mechanical application and instead, followed *Lewis*'s mandate to perform an exact analysis of the totality of facts in a given case. *Feist* was based upon the principles set out in *Lewis*. The majority opinion states that *Feist* should be overruled because it ignored *Lewis*. A fair reading of *Feist* would dictate that the mechanical application of *Lewis* to all high-speed police chases misreads *Lewis*.

BYE, Circuit Judge, concurring in part and dissenting in part, and with whom McMILLIAN, Circuit Judge, joins in Part II.

I reluctantly concur in Part II of the majority's opinion because I agree that *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998), requires a § 1983 plaintiff to satisfy the "intent to harm" standard in any high speed pursuit case; I write separately to explain why I believe the "deliberate indifference" standard would be more appropriate in many high speed pursuit cases. I respectfully dissent from Part III of the majority's opinion, however. I believe that Timothy Helseth survives summary judgment even when applying the higher "intent to harm" standard required by *Lewis*.

I

Lewis rests upon the premise that trained officers are unable to deliberate during the course of a high speed pursuit, no matter its duration. I question that premise. Behavioral and tactical training enables officers (particularly those who have been involved in many high speed chases, such as John Burch) to process the events in a rapidly-evolving situation as if they occurred at a more deliberate pace. In this respect, officers are analogous to professional athletes who study film and plot gameplans to "slow" the speed of a game, enabling them to understand and react instantaneously to complex, changing circumstances. Because police officers are regularly trained to adjust to fast-paced situations, we must expect that their conduct will usually be deliberate – despite the pace at which events occur to the untrained eye. *Lewis* suggests that we can't expect officers to think while they act, a proposition that might offend every well-trained officer in this country.

The facts of this case, as well as those in *Feist v. Simonson*, 222 F.3d 455 (8th Cir.2000), prove my point. In this case, the City of Blaine's police department regulations on high speed pursuits *required* officers to make conscious deliberations during the course of a chase:

> Officers involved in a pursuit *must continually question* whether the seriousness of the violation reasonably warrants continuation of the pursuit. A pursuit shall be discontinued when there is a clear danger to the pursuing officers or the public. . . . The pursuing officers *must consider* present danger, seriousness of crime, length of pursuit, whether or not the application of deadly force by the pursuing Officer is justified, and the possibility of identifying the suspect at a later time when determining whether or not to continue the pursuit.
>
> App. at 333 (emphasis added).

Indeed, Officer Burch *admitted* that he had time to deliberate during the pursuit:

> Q. But the policy and your training and your experience teach you to think about what you are doing in a high speed pursuit and whether the risk of the pursuit is worth the apprehension, correct.
>
> A. Sure.
>
> Q. And that is not just supposed to be a reflex, that is supposed to be a thought process, correct.
>
> A. Sure.
>
> Q. And you had time to make decisions about what tactics to use in the chase, correct?

A. Sure.

Q. You had time to consider whether you would try one type or another of ramming maneuvers, correct?

A. Sure.

* * *

Q. You had time to consider the mechanical damage that you had done to the vehicle.

A. That is correct.

* * *

Q. You had time to consider whether to continue the chase into another police jurisdiction.

A. That is correct.

Id. at 480-82.

Similarly, *Feist* involved an officer who had participated in over one hundred high speed chases who "[a]t many points during the chase [of extended duration] had the opportunity to balance the law enforcement goal of apprehending [the suspect] for use of a stolen vehicle (a low-level penalty likely carrying no prison time) against the threat to the general public." 222 F.3d at 461.

Because I believe that officers deliberate in most pursuits, I am frustrated by our inability to assess, on a case-by-case basis, whether the "deliberate indifference" standard should apply to a particular high speed pursuit. In adopting the "intent to harm" standard, the Supreme Court compared an officer's ability to deliberate during a high speed chase with that of a prison official responding to a riot. *See Lewis*, 523 U.S. at 852-53, 118 S.Ct. 1708

(discussing *Whitley v. Albers*, 475 U.S. 312, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986)). I find that comparison unhelpful. "[O]ur concern with preserving the constitutional proportions of substantive due process *demands an exact analysis of circumstances*" before deciding what shocks the conscience. *Id.* at 850, 118 S.Ct. 1708 (emphasis added). One's conscience may not be shocked by deliberate indifference to rioting prisoners. But in assessing the exact circumstances involved in a high speed pursuit of extended duration, an officer's deliberate indifference to the rights of innocent motorists and bystanders may very well shock the conscience.

Furthermore, the "intent to harm suspects" standard adopted by the Supreme Court fits ill with the type of § 1983 claim involved here – that of an innocent motorist injured as the result of a high speed pursuit. Oddly, under the Supreme Court's test, an innocent motorist need not prove that an officer intended to harm *him*, but that the officer intended to harm a *suspect*. Why are we concerned with an officer's intent to harm a suspect, a juror might wonder, when the innocent motorist's constitutional rights are at stake? The "deliberate indifference" test is more compatible with the § 1983 claim of an innocent motorist, who would then be required to prove deliberate indifference to his own constitutional rights.

For the reasons stated by the majority, however, I agree that the Supreme Court held that § 1983 claimants must satisfy the heightened, intent-to-harm standard in all high speed pursuit cases. Thus, irrespective of my differing views on a well-trained officer's ability to deliberate, I turn my attention to Mr. Helseth's proof that

Officer Burch intended to harm nineteen year-old Everett Contois, the fleeing suspect in this case.

II

Helseth introduced substantial evidence tending to prove that Burch intended to injure Contois. Burch purposefully placed himself in a position to take over as the lead pursuer in an ongoing chase. App. at 345. He chased the fleeing vehicle at extremely high speeds, between 80 and 100 miles per hour. *Id.* at 349. He chased the vehicle over a retaining wall, plowing through several residential backyards in the dark of night, within feet of trees, patios, and occupied homes. *Id.* at 342-44, 463-68. Officer Bott, the original officer, terminated the chase after the suspect vehicle drove into residential backyards; but Burch continued the pursuit for an extended period of time after that. *Id.* at 287, 291, 341, 349.

Most significantly, on four occasions Burch consciously employed PIT maneuvers to intentionally ram the suspect vehicle. *Id.* at 49, 345-46, 440-42, 471. The City of Blaine's police department regulations proscribe PIT maneuvers except in the most extreme circumstances. *Id.* at 330. PIT maneuvers are considered to be deadly force when used on a vehicle moving at high speeds ("intentional ramming causes the high probability of serious injury or death"). *Id.* Based on the Blaine regulations, as well as his training, Burch knew or should have known that intentional officer-initiated contact with a high speed vehicle was considered the use of deadly force. *Id.* at 46-49.

Under these circumstances, Officer Burch's conduct shocks the conscience. He knowingly and deliberately used deadly force against a suspect whose only known offenses were *misdemeanors* – speeding and fleeing a police officer. Officer Burch could have terminated this chase after he identified the vehicle's license plate[5] so that he or other officers could subsequently have investigated the matter. Instead, Burch continued a chase that ultimately produced the death and paralysis of innocent motorists, and the incarceration of Contois for eighteen years for third-degree murder.

Officer Burch's conduct would shock the conscience even if we knew nothing else about him. But we do. Helseth contends that Burch is that rare "rogue cop" who enjoys nothing more than the thrill of the chase. Burch's pre- and post-incident record strongly suggests that to be true. Burch was involved in multiple police vehicle collisions or accidents (several involving the intentional ramming of suspect vehicles) both before and after the Contois pursuit. App. at 239-48, 527, 547-56. He was disciplined on several occasions for his "maverick behavior" and failure to adhere to department policies and procedures (including frequent driving violations). *Id.* at 529-44.

During a 1989 disciplinary proceeding, Officer Burch stated "if I have to answer a call and concern myself with car safety, then people are going to die," leading the

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[5] Burch denied that he had identified the vehicle's license plate until he was confronted with his own voice, identifying the plate, on a tape recording of the radio transmissions during the chase. Supp. Jt.App. at A-2, A-3.

police chief to retort "[Burch] overlooks the fact that someone could die as a result of *his* unsafe driving." *Id.* at 529 (emphasis added). During a 1994 disciplinary proceeding, an arbitrator commented that "[t]he City suggests it has repeatedly attempted to reconcile [Burch's] maverick behavior through a variety of disciplinary actions but he fails to admit fault or demonstrate remorse." *Id.* at 538.

My concerns are somewhat alleviated by the fact that Burch decided to retire from the Blaine Police Department sometime after the City suspended him for unreasonably using deadly force by performing an unnecessary PIT maneuver in yet another high speed chase. In February 1998, Burch drove one of four squad cars (two from the City of Blaine and two from the City of Coon Rapids) involved in a high speed pursuit. Burch lost his spot in the chase when he struck the other Blaine squad car. The two Coon Rapids squads took over the chase. The suspect vehicle blew a tire, slowing to 40-50 miles per hour. By the time Burch had closed on the slowing pursuit, the suspect vehicle was pulling over and traveling about 5-10 miles per hour. Nonetheless, Burch radioed ahead his intention to ram the vehicle, sped between the two Coon Rapids squad cars, and intentionally rear-ended the slow-moving suspect vehicle. *Id.* at 552-56.

In *Lewis*, the Supreme Court stated that "only a purpose to cause harm *unrelated to the legitimate object of arrest* will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation [in a high speed chase]." 523 U.S. at 836, 118 S.Ct. 1708 (emphasis added). The majority concludes that we cannot infer intent to harm from Burch's intentional ramming

because "[t]he only harm intended by this conduct was incidental to Burch's legitimate objective of arresting Contois." *Ante* at 872. I strongly disagree.

"[T]he mere fact that force may have been used while effectuating an arrest does not automatically establish that the force was 'in relation' to a *legitimate object* of the arrest under a § 1983 analysis." *Davis v. Township of Hillside*, 190 F.3d 167, 172 (3d Cir.1999) (McKee, J., concurring) (emphasis added). I cannot view Burch's abuse of executive power as incidental to a *legitimate* law enforcement objective. Officer Burch's use of deadly force against a fleeing misdeameanant constituted a completely unreasonable use of force in violation of clearly established law. *See Tennessee v. Garner*, 471 U.S. 1, 12, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985) (noting a flat prohibition against the use of deadly force upon a fleeing misdemeanant, stemming from English common law and adopted by most American jurisdictions); Minn.Stat. § 609.066 (prohibiting the use of deadly force to prevent escape unless "the peace officer knows or has reasonable grounds to believe [the suspect] has committed or attempted to commit a *felony* involving the use or threatened use of deadly force [or] the officer knows or has reasonable grounds to believe [the suspect] has committed or attempted to commit a *felony* if the officer reasonably believes that the person will cause death or great bodily harm if the person's apprehension is delayed.") (emphasis added).

In addition, I believe that Burch's intentional ramming of a fleeing *misdemeanant's* vehicle amounts to the same level of terrorizing conduct involved in *Checki v.*

Webb, 785 F.2d 534 (5th Cir.1986).[6] The Supreme Court referred to *Checki* when, by negative implication, the

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[6] Contois described his state of mind after the ramming started as follows:

> The chase started out the guy was just chasing me, all right, then this other guy shows up on the scene and he just started ramming me . . . as soon as I came around the corner he hit me again and he hit me again and hit me again and he hit me, went the wrong way and he hit me again . . . he hit me down the road and he hit me in the ditch and he hit me there and he hit me here.
>
> . . .
>
> I realize that I was success[fully] speeding, but I would assume that the original officer chasing me realized that I wasn't intentionally endangering anybody else. Every time there was a stoplight . . . my brake lights would come on and I take off again when I saw him and kind of like a cat and mouse kind of thing . . . He saw me again, better take off again. . . . It wasn't like a terrifying situation . . . you are looking out . . . for cars . . . for people. But when all of a sudden it goes from . . . not just a cat and mouse thing anymore, it's a tiger and a mouse and this guy is going to get you no matter what it takes, so now you are really trying to get away. Before you were trying to elude, maybe hide and pull up in a driveway and shut your lights off so he drives by. But when they start ramming into your car, you don't have that option. You don't have the option of getting out and running when he is ramming into you. You figure if you do get out, he's going to shoot you so you just keep trying to get away.
>
> . . .
>
> When people say I'm crazy because I thought there that they were trying to kill me, if you read police procedures that [ramming] is considered deadly

Court recognized a redressible § 1983 action in situations when an officer intends "to worsen [a suspect's] legal plight." *Lewis*, 523 U.S. at 854 & n. 13, 118 S.Ct. 1708. One can hardly dispute that Contois's legal plight worsened as this chase progressed. A fleeing misdemeanant at the start of the chase, he was a murderer at its end.

The district court correctly concluded that Burch unreasonably used deadly force in violation of clearly established law, and that a reasonable jury could infer from Burch's conduct that he "intended to harm Contois and the three juvenile passengers in his car." *Helseth v. Burch*, 109 F.Supp.2d 1066, 1077 (D.Minn.2000). I would therefore affirm the district court's denial of Burch's motion for summary judgment on the basis of qualified immunity.

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force. Basically they are trying to kill you. That is not – well, let's just do this, no, let's try to kill this guy so he stops. So I don't think that my state of mind after being rammed was too far off base.

App. at 272-76.

APPENDIX B

United States District Court,
D. Minnesota.

Timothy HELSETH, Plaintiff,
v.
John BURCH and City of Blaine, Defendants.

No. CIV. 98-140 JRT/FLN.

Aug. 18, 2000.

Occupant of truck, severely injured when vehicle fleeing police struck his vehicle, sued officer driving pursuit vehicle and his municipal employer, claiming deprivation of his Fourth and Fourteenth Amendment rights. Officer and municipality moved for summary judgment. The District Court, Tunheim, J., held that: (1) Fourth Amendment rights of occupant were not violated; (2) occupant adequately alleged that his claim was against officer in his individual capacity; (3) there was fact issue whether officer was deliberately indifferent to public safety during chase, precluding summary judgment on question whether substantive due process rights of occupant were violated; (4) officer was not entitled to qualified immunity; and (5) occupant did not have claim against municipality.

Motions granted in part, denied in part.

James R. Schwebel, Schwebel Goetz & Sieben, Minneapolis, MN, Robert Bennett and Eric Hageman, Gartner, Bennett & Schupp, Minneapolis, MN, for plaintiff.

Jon K. Iverson, Paul D. Reuvers, Erstad & Riemer, Minneapolis, MN, for defendant Burch.

Pierre N. Regnier and Joseph E. Flynn, Katherine E Kennedy, Jardine, Logan & O'Brien, St. Paul, MN, and

Thomas M Sweeney, Sweeney Borer & Ostrow, St. Paul, MN, for defendant City.

MEMORANDUM OPINION AND ORDER ON DEFENDANTS' SUMMARY JUDGMENT MOTIONS

TUNHEIM, District Judge.

Plaintiff Timothy Helseth brings this action against defendants John Burch and the City of Blaine, Minnesota (the "City") under 42 U.S.C. § 1983 for alleged violations of his rights under the First, Fifth, Fourth and Fourteenth Amendments to the United States Constitution arising from a high-speed police chase. Plaintiff additionally charges defendants with conspiracy to deprive him of his constitutional rights, presumably under 42 U.S.C. §§ 1985 and 1986. This matter is before the Court on defendants' motions for summary judgment against all claims.

BACKGROUND

I. The High-Speed Chase

The events upon which plaintiff predicates his claims occurred shortly after midnight on August 22, 1995. While on duty in the City of Blaine, police officer William Bott clocked a car driving at approximately 111 miles per hour. The car, containing an eighteen-year-old driver and three juvenile passengers, proceeded through a stop sign without stopping. Bott began pursuing the vehicle with no knowledge about the vehicle or its passengers other than the fact that they were speeding. Bott activated his lights and siren, but the driver of the car, Everett Contois, did not respond and a high-speed chase ensued. The

chase proceeded along 109th Avenue, a wide, two-lane roadway in a relatively rural area with few cross-streets or structures appurtenant to the road. Contois later described it as "the local drag street." Contois proceeded through various stoplights, stop signs and other intersections, including at least one highway intersection, at speeds of approximately 70-80 miles per hour. As the chase continued, Contois, followed by Bott, turned southbound onto University Avenue, a more heavily trafficked, multi-lane roadway. From University Avenue Contois turned onto 101st Avenue and then onto Cloverleaf Parkway, a two-lane roadway proceeding through a residential area.

Defendant Burch was monitoring the chase on his car radio at the intersection of 99th Avenue and Clover Leaf Parkway. Because his own car was closer than Bott's to Contois's vehicle at that intersection, he joined the chase as the primary police car in pursuit. Bott eventually dropped out of the chase at Burch's request.

From Clover Leaf Parkway, Contois turned onto Polk Avenue, a two-lane, residential road. Contois proceeded through several stop signs without slowing down, and continued until he reached a dead-end cul-de-sac at the end of Polk. Contois stopped at the end of the cul-de-sac, but testified that because he felt frightened by Officer Burch he began driving again. He proceeded down a residential driveway, crossed over the lawn of a home, drove over a retaining wall, through a residential backyard, and onto Cottagewood Terrace. Burch followed Contois off-road in pursuit, driving over the same retaining wall and through backyards. Burch testified that he

did not see the retaining wall until he was upon it, because visibility at that time of night was limited.

As the chase proceeded down Cottagewood, Burch intentionally rammed his car into Contois's car in order to cause it to spin around and stop, a procedure described by police officers as a "PIT maneuver."[1] This action caused Contois's car to fishtail but was unsuccessful in spinning it around. Burch then rammed the car again with the same result.

The chase proceeded along the service road north of Highway 10. Burch initiated a third PIT maneuver, spinning Contois's car into the ditch between the service road and Highway 10 and causing damage to the car. The vehicle stopped briefly in the ditch when the engine died, but Contois was able to restart it. He drove out of the ditch and onto Highway 10, going eastbound in the westbound lanes into oncoming traffic. Burch followed closely behind. He rammed Contois's car a fourth time, causing it to cross the median on Highway 10 and to proceed eastbound in the direction of eastbound traffic. As a result of all of the hits, Contois's car was severely damaged. The convertible top was partially down, the driver's side window was broken when Contois's head went through it, the trunk was dented and unlatched, and the car began fishtailing and wobbling.

Nevertheless, the chase continued down Highway 10 and onto Highway 65, a four-lane divided roadway. As the chase proceeded out of the limits of the City of Blaine, a Spring Lake Park Police Officer joined in the pursuit

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[1] "PIT" stands for "Pursuit Intervention Tactics."

behind Burch at speeds of approximately 80 miles per hour. The chase continued onto 81st Street through a residential neighborhood, and towards a heavily trafficked commercial intersection at 81st and University Avenue. The chase ended when Contois entered the intersection against a red light at approximately 80-100 miles per hour and collided with plaintiff's truck. Plaintiff was severely injured in the collision and is now a quadriplegic as a result of his injuries. Another passenger in the truck was killed in the accident. The three passengers in Contois's car were also injured. The entire chase, from the time that Burch joined in, covered a time span of approximately six minutes.

After the chase was over police learned that Contois had been at a party with the three juvenile passengers in his car. During the party, Contois bragged that he could get his car to reach a speed of up to 160 miles per hour. When officer Bott saw the car, Contois was attempting to reach that speed. After the accident, Contois was convicted of third degree murder in addition to criminal vehicular operation and fleeing a police officer.

II. Officer Burch's Employment History & Training

Burch's employment with the City began in June 1978 and continued through February 1999. During that time he received training from the City on the legal aspects of various kinds of police work, including a class on the "Legal Aspects of Emergency Vehicle Operations," and another class on the "Legal Aspects of the Use of Force." Burch took both of these classes prior to the incident resulting in plaintiff's injuries, and testified generally

that he had been taught the constitutional limitations that are applicable to police conduct. Burch specifically testified that as a result of his education and experience he was aware that during a high-speed chase a police officer must continually analyze conditions along the chase route and assess whether pursuit should continue. He further testified that when the safety risks of continued pursuit outweigh the benefits of apprehending the suspect, a police officer should terminate the chase. The record reflects that in addition to the legal training he received, Burch also attended a number of driving classes, including two defensive driving classes in March 1983 and May 1989 and a class in pursuit driving in 1979. The record further reflects that Burch represented to the City that he had read and was aware of the City's pursuit and emergency response policies.

During his employment with the City, Burch was involved in a substantial number of traffic collisions while on duty. Twelve of these incidents occurred between September 1978 and June 1989, four of which involved what appear to be high-speed chases.[2] The City gave Burch a "counseling" session in February 1989 regarding one collision and a verbal warning in June 1983 pertaining to his "frequent accidents with squad cars." The City conducted an investigation into the June 1989 incident, and determined that he had been driving at an unsafe speed for the road conditions. During the investigation, Burch opined to his supervisor that if he had to concern himself with safe driving he could not otherwise

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[2] Three of the accidents apparently resulted from collisions with deer.

perform his job effectively. As a result of this investigation, the City suspended Burch without pay for two days.

The record contains no evidence of additional collisions involving Burch until October 1994. On that date, Burch was involved in another high-speed pursuit during which he implemented PIT maneuvers four times on a stolen vehicle that began traveling in the wrong direction through traffic. According to Burch, he initiated the PIT maneuvers only after assessing that the vehicle had slowed down significantly and that it presented a safety risk to oncoming traffic. Eventually Burch was able to stop the car using the PIT maneuver. No one was injured during the incident, and the City did not discipline Burch as a result of his involvement in it.

The record reflects that Burch was also involved in several traffic collisions after the August 1995 accident at issue in this case. These incidents include accidents resulting from high-speed chases occurring in April 1997, June 1997, and September 1997. It appears that the City did not discipline Burch or otherwise determine that his conduct was improper in connection with any of these incidents. Finally, Burch was involved in a collision with a suspect's vehicle in February 1998. The City investigated the incident and determined that it occurred while Burch was attempting to perform an unnecessary PIT maneuver constituting unreasonable use of deadly force against departmental regulations. The City recommended suspension for a period of twelve days as well as termination of Burch's employment. Nevertheless, union negotiations resulted in a settlement pursuant to which Burch was suspended for a period of five days and was not terminated, but began working the day shift instead of

the night shift. He voluntarily terminated his employment with the City approximately one year later.

III. Police Department Policies

Pursuant to the police department policy manual in effect at the time of the collision at issue in this case, officers involved in a high-speed chase must continually assess whether the seriousness of the violation justifies continuing pursuit. Officers should discontinue any chase presenting a "clear danger" to the pursuing officers or the public, such as "[w]hen the speed dangerously exceeds normal traffic flow or when pedestrians or vehicular traffic necessitates unsafe maneuvering of the vehicle." In deciding whether to discontinue a chase, officers are instructed to consider "present danger, seriousness of [the] crime, length of the pursuit, whether or not the application of deadly force by the pursuing Officer is justified, and the possibility of identifying the suspect at a later time."

The policy manual contains specific instructions pertaining to the use of intentional ramming techniques such as the PIT maneuver. The manual advises officers that intentional ramming is associated with a high probability of serious injury or death, and states that the practice is discouraged except in the most extreme circumstances. The manual further states that when the suspect vehicle is moving at high speeds, use of intentional ramming techniques will likely be considered deadly force such that laws governing the use of deadly force must be obeyed.

ANALYSIS

I. Standard of Review

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Only disputes over facts that might affect the outcome of the suit under the governing substantive law will properly preclude the entry of summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Summary judgment is not appropriate if the dispute about a material fact is genuine, that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *See id.* Summary judgment is required when, after adequate time for discovery and upon motion, the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to its case, on which that party would bear the burden of proof at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

In evaluating a motion for summary judgment, a court must give the nonmoving party the benefit of all reasonable inferences to be drawn from the underlying facts in the record. *See Vette Co. v. Aetna Cas. & Sur. Co.*, 612 F.2d 1076, 1077 (8th Cir.1980). However, the nonmoving party may not merely rest upon allegations or denials in its pleadings, but it must set forth specific facts by affidavits or otherwise showing that there is a genuine

issue for trial. *See Burst v. Adolph Coors Co.*, 650 F.2d 930, 932 (8th Cir.1981).

II. First and Fifth Amendment Claims

At paragraph four of his complaint plaintiff pleads claims against defendants under the First and Fifth Amendments to the United States Constitution. Nevertheless, he asserts no legal theory upon which these claims might rest and alleges no facts that might otherwise implicate the First or Fifth Amendments. Moreover, he ignores these claims entirely in responding to defendants' summary judgment motions. The Court accordingly dismisses these claims based on plaintiff's failure to prosecute them.

III. Fourth Amendment Claims

Plaintiff similarly fails to explain how Burch's conduct may have violated his own Fourth Amendment rights. In *County of Sacramento v. Lewis*, 523 U.S. 833, 843-45, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998), the Supreme Court rejected a Fourth Amendment claim in the context of a high-speed police chase resulting in a fatal collision. There, the fatally injured plaintiff was a passenger in the motorcycle being pursued, rather than an uninvolved bystander as plaintiff was in this case. During the chase the motorcycle tipped over, and a collision resulted because the police were unable to stop the squad car in time to avoid hitting it. The Court dismissed the plaintiff's Fourth Amendment claim on the ground that no search or seizure had occurred. Although the

Court acknowledged that police were attempting to seize the individuals on the motorcycle, it held that a Fourth Amendment seizure occurs only "when there is a governmental termination of freedom of movement *through means intentionally applied.*" *Id.* at 844, 118 S.Ct. 1708 (emphasis added) (quoting *Brower v. County of Inyo,* 489 U.S. 593, 596-97, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989)); *see also id.* at 845 n. 7, 118 S.Ct. 1708 (holding that "[*a*]ttempted seizures of a person are beyond the scope of the Fourth Amendment" (emphasis added)). Reasoning that the police did not intentionally cause the collision to occur, the Court held that no seizure had taken place.

Plaintiff cites *Hawkins v. City of Farmington,* 189 F.3d 695, 701-02 (8th Cir.1999), for the proposition that a collision caused during a high-speed police chase can result in a Fourth Amendment violation. The court in *Hawkins* distinguished that case from *Lewis* on the ground that there was evidence from which a jury could conclude that police intentionally caused the collision that stopped the plaintiff's vehicle and resulted in his injuries.

Plaintiff argues under *Hawkins* that Burch's conduct in deliberately ramming his car into Contois's vehicle constitutes a violation of the Fourth Amendment rights of all of the vehicle's passengers. Plaintiff's argument fails for two reasons. First, whether Burch violated the Fourth Amendment rights of Contois or the other passengers in his car is irrelevant, because none of those individuals are parties to this case. Plaintiff has no standing to assert the Fourth Amendment rights of anyone other than himself. There is absolutely no evidence that Burch intentionally caused the collision with plaintiff's truck in order to seize

plaintiff or otherwise force his truck to stop. *See Feist v. Simonson*, 36 F.Supp.2d 1136, 1144 (D.Minn.1999) (rejecting innocent bystander's Fourth Amendment claim in the context of a high-speed police chase on the ground that there "was no intentional act by the officers to restrain the liberty of [the plaintiff]"), *aff'd*, 222 F.3d 455 (8th Cir.2000).

Moreover, even if plaintiff could assert Fourth Amendment violations on behalf of Contois, under *Lewis* no Fourth Amendment violation occurred in this case. Although there is evidence that Burch intentionally collided with Contois's car on multiple occasions, those deliberate collisions did not ultimately result in a seizure. Rather, Contois continued to flee from Burch until he collided with plaintiff's truck – an incident demonstrated on the present record to be purely accidental. This case is therefore distinguishable from *Hawkins* on the ground that the means through which the termination of Contois's movement actually occurred, namely, the collision with plaintiff's vehicle, were not intentionally applied by police. Plaintiff's Fourth Amendment claims are dismissed for these reasons.

IV. Conspiracy Claims

Plaintiff asserts in his complaint that defendants engaged in a conspiracy to deprive him of his civil rights by filing false police reports, making false statements to investigators, improperly reporting the accident, inadequately investigating the accident, attempting to prevent plaintiff from filing his civil rights claims, and otherwise ratifying and acquiescing in violations of his substantive

due process rights. Plaintiff points to no evidence whatsoever in support of these assertions and fails to address his conspiracy claim in any fashion in response to defendant's summary judgment motion. In order to state a cognizable claim of conspiracy under federal civil rights law, a plaintiff must be able to demonstrate a mutual understanding or meeting of the minds among the alleged conspirators to deprive him of his civil rights. *See Haley v. Dormire,* 845 F.2d 1488, 1490 (8th Cir.1988); *Feist,* 36 F.Supp.2d at 1150 (dismissing virtually identical conspiracy claims on grounds of insufficient evidence). Plaintiff has failed to produce any evidence to support an inference that there was a meeting of the minds between Burch and other City officials to deprive him of his civil rights. His conspiracy claims are dismissed for these reasons.

V. Due Process Claim Against Burch

A. Individual capacity claim pleaded

Burch seeks dismissal of plaintiff's claims against him on both procedural and substantive grounds. Burch specifically contends that plaintiff's claims against him must be dismissed because plaintiff's complaint did not explicitly name him in his personal capacity. The Eighth Circuit has held that in order to state a section 1983 claim against a government official in his or her individual capacity, the complaint must clearly indicate that it is an individual capacity suit. *See Nix v. Norman,* 879 F.2d 429, 431-32 (8th Cir.1989) (applying this rule strictly in the context of claims against state officials on the basis of Eleventh Amendment principles); *Johnson v. Outboard*

Marine Corp., 172 F.3d 531, 535 (8th Cir.1999) (applying the *Nix* rule in the context of claims against municipal employees). The Eighth Circuit has expressed a strong preference for inclusion of the precise words "individual capacity" in pleading individual capacity suits against government officials under section 1983. *See Jackson v. Crews*, 873 F.2d 1105, 1107 (8th Cir.1989) ("If plaintiff wishes to sue defendants in both capacities, the following language would suffice: Plaintiff sues each and all defendants in both their individual and official capacities."). Nevertheless, when a complaint is otherwise sufficient to put government officials on notice that they are being sued personally, the Eighth Circuit has permitted the plaintiff's individual capacity claims to proceed. *See id.* (recognizing that the complaint was sufficient to state individual capacity claims even though it did not use those terms, but cautioning future litigants that use of such language would "be much better").

The Court has closely scrutinized plaintiff's complaint and finds that it is plainly sufficient to put Burch on notice of an intent to sue him in his individual capacity, although the phrase "individual capacity" appears nowhere in the complaint. The complaint notably asserts separate counts against Burch and against the City. Count I specifically asserts claims only against Burch.[3] Importantly, under this Count plaintiff seeks both compensatory and punitive damages – a remedy that is unavailable against government entities. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271, 101 S.Ct. 2748, 69 L.Ed.2d

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[3] Count I also states a claim against Bott, whom plaintiff later dismissed from this action.

616 (1981). Count II asserts claims only against the City and does not state a claim for punitive damages. Thus, plaintiff's claims against Burch and against the City are distinctly separate. Moreover, in his prayer for relief plaintiff clearly seeks both compensatory and punitive damages from Burch individually. The complaint specifically states a damages claim against Burch for twelve million dollars, but states a separate claim against the City for only fifty-thousand dollars and injunctive relief. Given the manner in which plaintiff structured his complaint, the only reasonable interpretation of it is that it asserts claims against Burch in his individual capacity in addition to claims against the City. Thus, the complaint is sufficient to put Burch on notice of plaintiff's intent to sue him personally and not just in his official capacity as an agent of the City.

Moreover, it is apparent that Burch understood that he is being sued individually. Burch has retained separate counsel from the attorneys retained by the City. Moreover, he focuses his defense on the doctrine of qualified immunity, a defense that is not available to government entities. *See Owen v. City of Independence*, 445 U.S. 622, 638, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980).

The Court finds for these reasons that plaintiff has pleaded claims against Burch in his individual capacity and accordingly rejects Burch's motion for dismissal on these grounds. Nevertheless, in light of *Johnson*, the Court also holds that it would have been more appropriate for plaintiff to state explicitly in his complaint that he pleads claims against Burch in his individual capacity. Plaintiff requests an opportunity to amend the complaint in order to state his claims against Burch individually with greater

clarity. In light of these concerns, plaintiff's request is granted.

Burch argues that permitting such an amendment would result in prejudice to him because he has not had an opportunity to conduct sufficient discovery on the issue of punitive damages. Nevertheless, for the above reasons Burch was clearly on notice that plaintiff asserted a punitive damages claim against him personally. Moreover, Burch does not state with any specificity what information he would seek to discover that he does not already have in his possession.[4] Burch has thus failed to demonstrate any degree of prejudice that would militate against an amendment to the complaint. Plaintiff's request to amend the complaint is granted for these reasons.

B. Qualified immunity

Burch forcefully asserts that plaintiff's claims against him must be dismissed under the doctrine of qualified immunity. In addressing whether a government official is entitled to qualified immunity against claims under section 1983, courts must first determine whether the plaintiff has alleged an underlying violation of a constitutional right. *See Lewis*, 523 U.S. at 1714 n. 5, 118 S.Ct. 1708 (stating that courts evaluating the qualified immunity defense should determine whether a plaintiff has alleged

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[4] It is difficult to guess what information Burch might seek to obtain from plaintiff, whose participation in the accident was undisputedly that of an innocent bystander, and whose personal finances are not properly admissible as a defense to his punitive damages claim.

a constitutional deprivation before addressing other elements of the defense). Upon finding that a constitutional violation occurred, courts must assess whether the right was clearly established at the time of the challenged conduct, and whether a reasonable official would know or should have known that his [sic] or conduct violated that right. *See Feist*, 222 F.3d at 462 (citing *Foulks v. Cole County*, 991 F.2d 454, 456 (8th Cir.1993)).

1. Constitutional violation

Burch contends that plaintiff's Fourteenth Amendment claim against him fails because plaintiff has not demonstrated that a violation of his substantive due process rights occurred. The Supreme Court addressed the culpability standard that courts should apply to due process claims arising in the context of high-speed police chases in *Lewis*. 523 U.S. at 845-55, 118 S.Ct. 1708. There, the Court rejected the Ninth Circuit's holding that "deliberate indifference" and "reckless disregard for life" are sufficient to state a due process claim based on a collision resulting from a high-speed police pursuit. *See id.* at 854, 118 S.Ct. 1708. Instead, the Court held that the police officer's conduct in this context must "shock the conscience" before a constitutional violation will arise. *See id.* at 846, 118 S.Ct. 1708 (citing *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952)). The Court opined that in some contexts, when an official has the opportunity to reflect upon and consider his or her options, "deliberate indifference" to a claimant's constitutional rights appropriately states the level of culpability necessary to demonstrate conscience-shocking behavior. *See id.*

at 853, 118 S.Ct. 1708; *see also id.* at 850, 118 S.Ct. 1708 (noting that deliberate indifference is sufficient to state a due process claim based on failure to meet the medical needs of a prisoner awaiting trial). The Court nevertheless held that when an official is required to make snap decisions, deliberate indifference is not an appropriate standard since the official has no real opportunity to deliberate. *See id.* at 851, 118 S.Ct. 1708. In this context even "precipitate recklessness" is insufficient to shock the conscience. *Id.* at 853, 118 S.Ct. 1708. The Court concluded that, "high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment." *Id.* at 854, 118 S.Ct. 1708.

In *Feist*, 222 F.3d at 462-465 the Eighth Circuit interpreted the Supreme Court's holding in *Lewis* narrowly. Recognizing that the holding in *Lewis* rested upon the instantaneous decision-making process usually attendant to high-speed pursuit, the court held that "[i]n situations where an officer could have actually deliberated, courts are to apply the deliberate indifference standard to determine whether the behavior was conscience shocking." *Id.* at 461. Thus, although *Feist* involved a high-speed chase similar to the one at issue in *Lewis*, the court affirmed the district court's holding that the deliberate indifference standard applied because the facts alleged indicated that the officer involved had an opportunity to exercise considered judgment. *See id.* at 463-465. In denying summary judgment, the district court observed that while the high-speed chase at issue in *Lewis* continued for little more than a minute over a distance of just over a mile through a consistently low-trafficked, residential area, the chase in

Feist lasted for more than six minutes with escalating levels of danger along the chase route. *See Feist*, 36 F.Supp.2d at 1146 ("At many points during the chase, Simonson had the opportunity to balance the law enforcement goal of apprehending Shannon for use of a stolen vehicle . . . against the threat to the general public. Each new turn onto the one-way streets and especially the accessing the freeway to drive on the wrong side of the median, presented a juncture for reassessment and evaluation of the escalating consequences of the chase.").

The facts alleged in the case at bar are strikingly similar to those asserted in *Feist*. Indeed, they are so similar that Burch conceded during the hearing on defendants' motions that if the Eighth Circuit affirmed the lower court's decision in *Feist*, as it now has, the claims against him should proceed to trial. As in *Feist*, the chase at issue in this case lasted for approximately six minutes at extraordinarily high speeds and covered increasingly dangerous road conditions. The chase began in a relatively safe, rural area on a wide road with few obstructions known as the local "drag street," but continued through residential and more heavily trafficked commercial areas, through numerous stop signs and stoplights, and onto a highway proceeding in the opposite direction of oncoming traffic.

Defendants might argue that the traffic conditions at issue in *Feist* were much worse than those at issue in this case. There, the chase took place in mid-afternoon in an urban area, close to a tunnel, on one of the busiest freeway intersections in Minnesota. In this case, the chase took place shortly after midnight in a suburban area on a somewhat smaller highway. Nevertheless, other factors

not present in *Feist* make the pursuit in this case equally as dangerous. Here, Burch not only chose to pursue the suspect's car through residential neighborhoods, but actually drove his squad car through the driveways and yards of local residences. Burch admitted that he could not see the retaining wall that he drove over until it was too late to avoid it. Thus, it seems highly unlikely that he could have avoided hitting any pedestrians walking in the off-road areas where he drove. While the late hour during which the chase occurred likely resulted in a significant decrease in traffic, it also substantially decreased visibility both for the police and the suspect they were pursuing. Moreover, unlike the suspect vehicle being pursued *Feist*, Contois's car sustained significant damage during the chase as a result of the PIT maneuvers that Burch implemented. Burch continued his pursuit despite the fact that the car began fish-tailing across the road as a result of the damage, thus increasing the danger to the public that Contois would lose control of the vehicle.

At each significant juncture along the chase route – before pursuing Contois off-road onto residential property, before chasing him against oncoming traffic onto a highway, before striking Contois's vehicle multiple times, and at the point in time when Contois's badly damaged vehicle began swerving – Burch had an opportunity to weigh the importance of apprehending Contois against the escalating threat to public safety that the chase presented. Indeed, Burch testified that during the chase it was possible for him to assess continually whether the goal of apprehending Contois outweighed the risks to

public safety, that he had time to make considered decisions about the tactics that he used during the chase, and that he had time to think about the impact of the damage to Contois's vehicle on its mechanical functioning. Nevertheless, Burch continued the chase despite the fact that Contois was suspected of nothing more than speeding, a misdemeanor, and fleeing a police officer, a gross misdemeanor. *See Feist*, at 463-464 (noting as significant the fact that police had no reason to suspect that the driver was guilty of anything more than a low-level felony).

The evidence thus supports a conclusion that Burch engaged in conscious deliberation rather than reflexive conduct. Under these circumstances the deliberate indifference standard applies. *See id.* at 464-465. Moreover, in light of the serious threat to public safety that the chase presented and the relatively inconsequential crimes with which Contois was suspected, the Court finds that a material question of fact exists as to whether Burch acted with deliberate indifference to public safety and thus to plaintiff's constitutional rights.

Furthermore, even if the Court were to assume that *Lewis's* "intent to harm" standard applies broadly to all high-speed chases, the evidence supports a reasonable conclusion that Burch possessed the requisite level of culpability. Burch was keenly aware, as a result of his training and experience, that using a PIT maneuver against a car moving at high speeds causes a high probability of serious injury or even death. Yet, he used the maneuver on Contois's vehicle at least four times while it was moving at high speeds, under conditions that plainly

did not justify the use of deadly force.[5] Moreover, he continued to use the procedure even after it became evident that the vehicle was badly damaged and that if left alone the driver would likely stop due to the associated mechanical difficulties.[6] A reasonable jury could infer from these facts that Burch intended to harm Contois and the three juvenile passengers in his car. Under either the "deliberate indifference" standard or the "intent to harm" standard, a genuine fact issue exists as to whether Burch's behavior was truly shocking to the conscience. For these reasons, plaintiff has met his burden of establishing that a constitutional violation occurred.

2. Clearly established law

Burch contends that even if a deprivation of plaintiff's constitutional rights occurred, the law pertaining to those rights was not sufficiently established at the time of the chase to give rise to legal liability. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) (providing that government officials are immune from civil rights liability unless the law clearly established that their conduct was unlawful at the time that it

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[5] Burch's use of the PIT procedure in order to force Contois's car into the correct lane of traffic was perhaps justified as a public safety measure. Nevertheless, he initiated the PIT procedure at least three times before Contois began driving against traffic.

[6] Contois testified that he continued to flee because he became terrified, when Burch began ramming his car, that the police were attempting to kill him.

occurred); *see also Johnson-El v. Schoemehl*, 878 F.2d 1043, 1048 (8th Cir.1989) (stating that a right is not clearly established unless its contours are "sufficiently clear that a reasonable official would understand that what he is doing violates that right"). The precise conduct at issue need not have been held unlawful for the right violated to be "clearly established," however, "in light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987).

In *Feist*, at 464-465, the Eighth Circuit held it was well-established long before August 1996 that police could be held liable under the Due Process Clause for their conduct during high-speed pursuits. In so holding, the court cited to numerous authorities from various circuits indicating that substantive due process liability could arise in this context. *See id.* (citing *Roach v. City of Fredericktown*, 882 F.2d 294, 297 (8th Cir.1989); *Evans v. Avery*, 100 F.3d 1033, 1038 (1st Cir.1996); *Webber v. Mefford*, 43 F.3d 1340, 1344 (10th Cir.1994); *Fagan v. City of Vineland*, 22 F.3d 1296, 1308-09 (3rd Cir.1994); *Temkin v. Frederick County Comm'rs*, 945 F.2d 716, 723 (4th Cir.1991); *Checki v. Webb*, 785 F.2d 534, 538 (5th Cir.1986)). The chase at issue in the case at bar occurred in August 1995, approximately one year prior to the chase at issue in *Feist*. Nevertheless, all but one of the precedents upon which the *Feist* court relied were published prior to August 1995. For this reason, and because the facts in this case are remarkably similar to the facts alleged in *Feist*, the Court concludes that two cases are not materially distinguishable for purposes of analyzing this issue. The Court accordingly follows the Eighth Circuit's guidance,

and holds that the law pertaining to due process liability in this context was clearly established at the time when the alleged violation of plaintiff's constitutional rights occurred.

3. Reasonableness of Burch's conduct

"Once it has been established that the alleged constitutional violation is supported by clearly established law, a qualified immunity defense will ordinarily fail, since a reasonable government actor should or would have known the law governing his conduct was a constitutional principle supported by clearly established law." *Id.* at 465 (citing *Buckley v. Rogerson*, 133 F.3d 1125, 1131 (8th Cir.1998)). Nevertheless, when a government official can affirmatively show that he neither knew nor should have known that his conduct was unconstitutional, he may be entitled to qualified immunity. *See id.*

Burch contends that he is entitled to qualified immunity because a reasonable police officer in his position would not have known that his conduct violated a constitutional right. The evidence does not support this assertion. Burch testified that based on his training, education and experience he was aware of the specific limitations of police activity required by the Constitution in connection with substantive due process and the use of deadly force, including deadly force with a motor vehicle. He further testified that he understood that police practices and policies pertaining to deadly force and emergency vehicle operation mirror the protections established under the Constitution. Finally, he stated that he was aware that civil liability might arise from the manner in which he

operated his squad car during high-speed pursuits, and that he understood the need for continuous evaluation of the surrounding conditions in order to avoid such liability. In light of these admissions and the development of the law at the time when the chase occurred, the Court finds that a reasonable officer in Burch's position should have known that his conduct might result in a constitutional violation. Burch's motion for summary judgment on the basis of qualified immunity is denied for these reasons.

VI. Due Process Claim Against the City

The City challenges plaintiff's due process claim against it on the ground that plaintiff has failed to establish the requisite elements for section 1983 liability against a municipality.[7] In contrast with common tort law, section 1983 does not give rise to vicarious liability against a government entity simply because it employs an official who has violated the Constitution.[8] *See Monell v.*

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[7] The City separately challenges plaintiff's purported punitive damages claim against it on the ground that municipalities are immune from such damages under section 1983. *See City of Newport*, 453 U.S. at 271, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981). For the above reasons the Court does not interpret plaintiff's complaint to state a punitive damages claim against the City, but rather, only against Officer Burch in his individual capacity. The City's argument on this issue is therefore unwarranted.

[8] Plaintiff argues that section 1983 supports claims against municipalities that are "derivative" of claims against individual municipal employees and are not based on the municipalities' own misconduct. This statement of the law is incorrect. As

Department of Soc. Servs., 436 U.S. 658, 691-92, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Instead, municipal liability only arises when a claimant can demonstrate that the alleged unconstitutional conduct resulted from an official government policy or from practices of government officials that are so well-settled as to constitute a "custom or usage" with the force of law. *See id.* at 690-91, 98 S.Ct. 2018. Moreover, as the Supreme Court recognized in *City of Canton v. Harris*, 489 U.S. 378, 388, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989), a municipality may be liable under section 1983 when it has a policy or custom of inadequate training or supervision and that inadequacy amounts to deliberate indifference to the constitutional rights of others.

Although plaintiff argues at length about the legal standards applicable to his claims against the City, he supports his arguments with very little reference to the facts of this case. He points to no formal municipal policy from which his claims against the City might arise. Indeed, plaintiff argues forcefully that Burch violated

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Monell makes clear, derivative or vicarious liability never arises under section 1983. *See Monell*, 436 U.S. at 694, 98 S.Ct. 2018; *see also Mettler v. Whitledge*, 165 F.3d 1197, 1204 (8th Cir.1999). Rather, a cognizable civil rights claim against a municipality only exists when the claimant demonstrates that a municipal policy or custom was the "moving force" behind a violation of the claimant's constitutional rights. *See Mettler*, 165 F.3d at 1204 (citing *Monell*, 436 U.S. at 694, 98 S.Ct. 2018). This requirement may be satisfied even when no individual government official is personally liable for violating the claimant's constitutional rights, as long as an underlying constitutional deprivation resulted from the municipality's culpable conduct. *See Doe v. Washington County*, 150 F.3d 920, 922 (8th Cir.1998).

departmental policies by continuing the pursuit that ultimately resulted in his injuries. Thus, he does not state a claim based upon an unconstitutional municipal policy.

He similarly does not appear to base this claim on an unconstitutional custom or practice among police department employees. In order to establish the existence of such a custom, plaintiff must demonstrate:

> (1) The existence of a continuing, widespread, persistent pattern of unconstitutional misconduct by the governmental entity's employees;
>
> (2) Deliberate indifference to or tacit authorization of such conduct by the governmental entity's policymaking officials after notice to the officials of that misconduct; and
>
> (3) Th[e] plaintiff['s] injur[y] by acts pursuant to the governmental entity's custom, i.e., [proof] that the custom was the moving force behind the constitutional violation.

Mettler, 165 F.3d at 1204 (quoting *Ware v. Jackson County,* 150 F.3d 873, 880 (8th Cir.1998)) (alterations in the original). Although plaintiff has shown that Burch was involved in numerous work-related traffic accidents during his career with the City's police department, he offers no evidence of any police officer other than Burch who has engaged in inappropriate pursuit tactics. Thus, it is questionable whether the misconduct at issue in this case could be deemed to be sufficiently "widespread" within the City's police force to engender municipal liability.

Moreover, the record does not otherwise establish that Burch engaged in a [sic] such a well-settled, continuing, or persistent pattern of misconduct as to have the

force of law. The majority of his recorded traffic accidents occurred either after the collision at issue in this case or at least six years prior to it. Between June 1989 and August 1995, the date of the collision, only a single incident in October 1994 occurred. Although the record reflects that Burch used PIT maneuvers against a suspect's vehicle on that occasion, there is no evidence that his conduct in doing so was in any way improper. Rather, it appears that Burch may have acted appropriately on that occasion by using the technique only when the suspect began endangering the public, and by slowing the suspect's vehicle first in order to reduce the likelihood of serious injury. This incident did not end in an accidental collision and did not result in any injury to the suspect, police, or third parties. *Cf. Feist*, 36 F.Supp.2d at 1150 (reasoning that, "[t]he fact that [the defendant police officer] has been involved in a number of pursuits and never abandoned a chase does not itself support an inference that he has engaged in a pattern or practice of such conduct," when the past pursuits in evidence were not shown to be unconstitutional). Thus, at the time of the collision in this case, it does not appear that Burch had an established pattern of unconstitutional misconduct that was either continuous or persistent.

Furthermore, plaintiff has not demonstrated that the City was so unresponsive to Burch's misconduct as to be deemed deliberately indifferent to it. The City reprimanded Burch on more than one occasion in connection with his poor driving record and suspended him as a result in June 1989. After that suspension Burch's record remained clear, with the exception of the October 1994 incident, until the collision at issue in this case occurred.

The record does show that Burch was involved in a series of frequent accidents involving high-speed chases in 1997 and 1998. Nevertheless, the City ultimately responded to these incidents by suspending Burch for a period of six days, forcing him to work the day shift instead of the night shift, and even recommending his dismissal. These actions are not indicative of indifference to Burch's behavior. Plaintiff has therefore failed to present a viable *Monell* claim based upon an established custom or pattern of unconstitutional conduct among police department employees.

Plaintiff focuses his claim against the City on its allegedly unconstitutional policy or practice of failing to supervise and train Burch adequately. *See Canton*, 489 U.S. at 388, 109 S.Ct. 1197. Plaintiff specifically complains that in light of Burch's driving record, the City should have assigned him to a desk job, required him to work the day shift, or otherwise limited his participation in high-speed chases. Plaintiff further contends that the City should have provided Burch with special driver's training in response to his high accident record.

Upon reviewing the record, the Court finds the evidence insufficient to permit plaintiff's failure-to-train claim to proceed. Had the City modified Burch's responsibilities or required him to undergo additional driver's training classes, the possibility of collisions such as the one resulting in plaintiff's injuries might have been reduced. Nevertheless, plaintiff cannot sustain his burden of proof simply by showing that the City could have done more to prevent the alleged constitutional deprivation from occurring. Rather, plaintiff must demonstrate that the City's failure to train and supervise Burch amounts to

"deliberate indifference to the rights of persons with whom the police come into contact." *Id.* at 388, 109 S.Ct. 1197.

In light of the significant amount of relevant training that Burch received from the City, plaintiff has failed to meet this requirement. Burch received specialized training in both the legal limits of using force and the legal consequences associated with operating his squad car. He also took classes during his tenure with the City on defensive driving and driving in high-speed chases, and was made aware of the City's policies on pursuit, emergency response, and intentional ramming techniques. Plaintiff complains of no particularized deficiency in any of Burch's coursework. As this evidence demonstrates, far from acting with indifference to plaintiff's rights, the City has made an affirmative effort to train its officers in order to prevent the kind of tragic collision that occurred in this case.

Plaintiff similarly fails to provide sufficient evidence that the City neglected to supervise Burch properly. Removing Burch's emergency response duties from him as a result of his high accident record likely would have prevented this tragedy. Nevertheless, the City's decision to forgo such severe discipline and to suspend him instead is simply not such an ineffectual or feeble response as to amount to deliberately indifferent supervision. The City's motion for summary judgment against plaintiff's *Monell* claim is granted for these reasons.

ORDER

Based on the foregoing, and all of the records, files and proceedings herein, **IT IS HEREBY ORDERED** that:

1. The City's motion for summary judgment [Docket No. 22] is **GRANTED.**

2. Count II of plaintiff's complaint is **DISMISSED, with prejudice.**

3. Defendant Burch's motion for summary judgment [Docket No. 26] is **GRANTED in part** and **DENIED in part.**

4. Count III of plaintiff's complaint (Conspiracy) is **DISMISSED, with prejudice.**

5. The portions of Count I arising under the First, Fifth, and Fourth Amendments to the United States Constitution are **DISMISSED, with prejudice.**

6. Defendant Burch's motion for summary judgment is **DENIED** in all other respects.

7. Plaintiff's request for permission to file an amended complaint [Docket No. 28] is **GRANTED.** Plaintiff may amend the complaint for the limited purpose of clarifying that he sues defendant Burch in his individual capacity. Plaintiff shall file the amended complaint within fourteen (14) days from the date of this Order.